87-1210

No. .....

In The

Supreme Court of the United States

October Term, 1987

ROBERT J. AFFELDT,

Petitioner,

vs.

MAGISTRATE JAMES G. CARR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT J. AFFELDT, ESQ.

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QUESTIONS PRESENTED FOR REVIEW

DID THE DISTRICT AND CIRCUIT COURTS COMMIT REVERSIBLE ERROR IN FINDING APPELLANT ATTORNEY LIABLE FOR A RULE 11 VIOLATION, FILING A FRIVOLOUS COMPLAINT, WHEN THESE COURTS FAILED TO CONSIDER THE PRINCIPAL THRUST OF APPELLANT'S COMPLAINT—THE ISSUANCE BY THE MAGISTRATE OF A VAGUE, OVERBROAD, AND ILLEGAL PRIOR RESTRAINT ORDER WHICH COMPLETELY PROHIBITED ALL SPEECH AND ASSOCIATION WITH THE SUCCESSOR LAW FIRM?

(A) Does the doctrine of *Pulliam v. Allen*, 104 S.Ct. 1970 (1984), stripping the magistrate of judicial immunity, apply to the irreparable harm-injunction seeking provisions of the appellant attorney's complaint?

(B) If the doctrine of *Pulliam v. Allen* applies to the appellant's complaint, leaving the magistrate without judicial immunity when he issued his prior restraint order banning all communication between the appellant and successor law firm, can there be any Rule 11 violation?

(C) Should the circuit court have reversed the district court under the clearly erroneous doctrine when that court found appellant's complaint was based upon the October 20, 1983 disqualification order and not on the August 2, 1984 order banning all communication between appellant and the successor law firm? Was the circuit court clearly erroneous when it found that the magistrate's prior restraint order pertained to the relationship between the appellant and the parties and not between the appellant and the successor law firm? Did the circuit court commit reversible error when it relied upon facts not contained in the record, but specifically rejected by the magistrate and the district court?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are Robert J. Affeldt, an attorney, who is petitioner and plaintiff/appellant and James G. Carr, a federal magistrate, who is respondent and defendant/appellee.

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The Order of the United States District Court for the Northern District of Ohio Eastern Division granting the defendant Magistrate's motion to dismiss with prejudice for failure to state a claim and based upon the doctrine of judicial immunity is reproduced herein at Appendix D.

The Order of the United States District Court for the Northern District of Ohio Eastern Division setting out findings of fact and conclusions of law for its previous order of dismissal with prejudice is reproduced herein at Appendix E.

The Order of the United States District Court for the Northern District of Ohio Eastern Division granting sanctions against the petitioner under Rule 11 is reproduced herein at Appendix F.

The Report and Recommendations of the Magistrate removing the named plaintiffs in a putative class action, disqualifying the class attorney, and ordering the new class representatives to seek independent counsel if their cause is to be continued as a class action is reproduced herein at Appendix G.

The Report and Recommendations of the Magistrate denying class certification in a putative class action be-

cause the class representatives failed to comply with the court's mandate to secure independent counsel is reproduced herein at Appendix H.

JURISDICTION

Petitioner seeks review of the August 24, 1987 judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the district court and of the Sixth Circuit's Order of October 15, 1987 denying petitioner's petition for rehearing en banc.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS RELIED UPON

Petitioner relies upon the First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Petitioner also relies upon the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

—o—

STATUTE RELIED UPON

Petitioner relies upon 28 U.S.C. § 1254(1):

> Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:
>
> * * *

—o—

STATEMENT OF THE CASE

The petitioner, Robert J. Affeldt, and the respondent, James G. Carr, were law professors on the faculty of The University of Toledo Law School and when Carr was appointed Federal Magistrate, the petitioner, who specialized in Title VII litigation, moved to recuse him from his cases. This motion was denied. In a major Title VII case, *Sharp, et al. v. Owens Corning Fiberglas Corporation*, the petitioner in 1983 moved for removal of the three class

representatives on the ground that they had consistently violated their duties to the class members and had refused even to pay costs for the suit. The named class representatives resisted the motion, arguing that they had always been ready to pay costs but were never informed of the exact amount of such costs. After a September 19-20 hearing on petitioner's motion for removal, the magistrate, in an October 20, 1983 order, removed the three class representatives because of perjury committed by them at the hearings. Also, in the same order, the magistrate disqualified the petitioner because of the testimony of the three perjured removed class representatives who testified that they were not properly informed of costs. No injury to the class was shown; no legal authority was given and no facts were presented by the magistrate for the disqualification order. Later, in depositions taken by the petitioner, the removed class representatives admitted being kept informed of costs, but the magistrate and the district court judge refused to view such evidence.

In the October 20, 1983 order, the magistrate ordered the new putative class representatives to select "independent counsel" within thirty days. At that same time he said that his order was "a limited, narrow one". [App. G, p. 34.] He did not define what he meant by the term "independent counsel". He did not discuss any type of relationship of appellant with the successor law firm—what was "actual" or "possible" control—or their relationship in other, non-OCF cases. No guidelines were offered. One could only guess at the scope of the order.

On August 2, 1984, the magistrate suddenly gave life to his innocuous, vague, and "narrow" October 20 order

which had ordered the class representatives to seek "independent counsel". Now, he said that "that order [the previous order] was broad, and far reaching and neither encouraged nor permitted a restrictive interpretation of either its purpose or its effect." [Appendix H, p. 10.] "There was to be no connection of any kind whereby the possibility of such control could be engendered." [Appendix H, p. 4.] First Amendment rights are subordinate to his order. [Appendix H, p. 9.] Any form of speech or association of the petitioner with the successor law firm for whatever purpose could be considered evidence of a possibility of control of the successor counsel. Admitting after ordering an investigation by opposing law firm counsel, that there was no evidence of any control by the petitioner in the OCF case, that petitioner or the parties had violated his order [App. H, p. 8], the magistrate found a remote possibility of control in the fact that the petitioner associated with the law firm in other, non-related Title VII cases. The factual record in this case shows that it was absolutely impossible for any "actual" or "possible" control to be exercised by the petitioner in the OCF case for the class action aspects of that case had been concluded at the class certification hearing held in May, 1983. No work was possible on the class aspects of the case for all parties were now awaiting the magistrate's decision on whether the class was to be certified or class status denied.

On April 30, 1985, the petitioner filed suit against the magistrate seeking an injunction against his August 2, 1984 prior restraint order. See paragraphs 12, 14, 18, and 22 of the petitioner's complaint [Appendix C], which alleged that the magistrate's prior restraint order "interfered with the First Amendment rights of the plaintiff"

. . . by ordering him not speak to or associate with the successor law firm. On May 9, 1985, the magistrate moved for dismissal under Rule 12(b)(6) on the basis that he was "immune from this suit as a consequence of being a judicial officer exercising the duties of his office." [App. D, p. 1] In its two-page order, the district court said: "The doctrine of judicial immunity is indeed applicable in the instant case." [App. D, p. 2] On November 5, 1985, the district court held that while the doctrine of no judicial immunity, as proclaimed in *Pulliam* was applicable to vague and overbroad gag orders, it was not applicable in the instant case because the gag order issued by the magistrate was a legal gag order, a disqualification order issued on October 20, 1983. [App. E.] The magistrate had discretion to issue such an order and as authority for such a conclusion, the district court cited narrow gag order cases in which courts sanctioned gag orders in order to insure a fair trial for the accused in an impassioned environment, which were completely irrelevant to this case. The factual record in this case shows conclusively that the petitioner's complaint was directed against the magistrate's August 2, 1984 interpretations of his October 20, 1983 order, banning all communications between the petitioner and the successor law firm. The allegations charging invasion of First Amendment rights did not occur until August 2, 1984 and the successor law firm was not present in the case until 1984.

In December 1985, after the district court dismissed the petitioner's lawsuit, the magistrate filed a Rule 11 motion for sanctions, arguing that he was protected by the judicial immunity doctrine when he issued his prior restraint order. The doctrine of *Pulliam v. Allen*, he argued,

was not applicable to the disqualification order of October 20, 1983, which he equated with the prior restraint order. On April 24, 1986 the district court agreed [App. F], stating that since the petitioner had had an evidentiary hearing on September 19-20, 1983, he was aware or should have been aware that his complaint had no proper legal or factual foundation. The district court completely ignored the thrust of the petitioner's complaint that the August 2, 1984 prior restraint order which banned all communication between the petitioner and the successor law firm was illegal.

The appellate court agreed with the petitioner that the complaint had attacked the magistrate's order of August 2, 1984 and not the October 20, 1983 disqualification order, but held contrary to the express provisions of the complaint that the petitioner was only complaining about the banning of communication between the PARTIES. The Sixth Circuit said, in its August 24, 1987 opinion:

> "Appellant contends that appellee ordered him not to 'contact' or 'associate' with the PARTIES [Emphasis supplied] in the discrimination case and that this constituted a prior restraint resulting in appellant having to 'leave the State of Ohio and City of Toledo. . . .' Although the Supreme Court in *Pulliam* held that the doctrine of judicial immunity is not a bar to prospective injunctive relief against a judicial officer in her judicial capacity, *Pulliam*, 466 U.S. at 541-42, the *Pulliam* decision does not apply in the present case. The magistrate did not order appellant not to contact or associate with the PARTIES [Emphasis supplied] in the class action case."
>
> [App. B, p. 12.]

The court below also held contrary to the record, the findings of the magistrate, and the district court that "the appellant assisted successor counsel in the preparation of the class action suit." [App. B, p. 3.]

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ARGUMENT

I. THE DOCTRINE OF *Pulliam v. Allen* IS APPLICABLE IN THIS CASE WITH THE RESULT THAT THE DOCTRINE OF JUDICIAL IMMUNITY DOES NOT APPLY TO THE MAGISTRATE WHEN HE ISSUED HIS PRIOR RESTRAINT ORDER WHICH PROHIBITED ALL COMMUNICATION BETWEEN THE PETITIONER AND THE SUCCESSOR LAW FIRM

In *Pulliam v. Allen*, 104 S.Ct. 1970 (1984), this Court held that the public interest in preserving an independent judiciary would not be threatened by suits against courts for injunctive relief. In these instances the doctrine of judicial immunity is not applicable to a judicial act which violates a victim's constitutional rights. In *Pulliam* there was a violation of the plaintiff's due process and equal protection rights, but in the instant case the offense is the most serious known to the Law, a prior restraint order which invaded the petitioner's First Amendment rights. Such orders "are the most serious and least tolerable infringement upon First Amendment rights." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976). "Even a temporary restraint on expression may constitute irreparable injury." *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968).

Blanket, non-restrictive across the board orders are null and void. *CBS v. Young*, 522 F.2d 234 (6th Cir. 1975); *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981); *WXYZ, Inc. v. Hand*, 658 F.2d 420 (6th Cir. 1981). Such vague and broad prior restraint orders are presumptively invalid and can only be supported "by specific findings that the enjoined speech creates a 'clear and present danger' or an imment threat to a competing protected interest." *International Union, UAW v. Dana Corp.*, 679 F.2d 634, 653 (6th Cir. 1982). "The courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." 8 Wright and Miller, *Federal Practice and Procedure*, ¶ 2035 at 265 (1970). The order must be no broader than absolutely necessary to protect the countervailing interest. Vagueness and overbreadth will not be tolerated, for the courts do not demand that a person should have the duty to guess at the breadth of the order. *Chase v. Robson*, 435 F.2d 1059, at 1061 (7th Cir. 1970) It is the court which has the burden of proof in justifying such an order, demonstrating the necessity to protect a higher social value, that it employed the least drastic means and that the order was specific so that people are not compelled to act at their peril. Bickel, THE MORALITY OF CONSENT (1971), p. 134, n. 61.

In a recent decision, this Court held in *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 55 LW 4855 (1986), that a blanket prohibition of speech and association violates the First Amendment. This Court said: "Such a law that confers on police virtually unrestrained power to arrest and charge

persons with a violation of the resolution is unconstitutional because 'the opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.' "- 55 LW at 4857. This is exactly what happened in this case. The magistrate fleshed in his conception of violations without putting the petitioner on notice of what constituted a violation. The magistrate completely failed to carry his burden of proof in justifying his prior restraint order, holding no evidentiary hearing, failing to identify an overriding value to be protected, and disregarding employment of a less drastic means. There was no countervailing value to be protected, for the class action aspects of the OCF case was in limbo, for after the May 1983 class action evidentiary hearing, the case was frozen until the magistrate either denied class certification or granted it. If the class was denied certification, no further work was necessary and if the class was granted certification, no further work on the class aspect was required. In any event, class action or no class action, the blank check prior restraint order was unconstitutional as this Court found in *Board of Airport Commissioners, supra.*

The district court did not address the fundamental issue in this case—whether the *Pulliam* doctrine of no judicial immunity protecting the magistrate applied when the magistrate issued his prior restraint order banning all communication between the petitioner and successor law firm. Instead, contrary to fact and the record, the district court by equating the disqualification order with the gag order declared that it was a legal gag order since a court has the power to issue such an order to protect a higher value—the administration of justice. All the de-

cisions cited by the court to support this conclusion were narrow cases in which courts sanctioned gag orders when the fairness of a trial was threatened. The district court then proceeded to say that since petitioner was accorded an evidentiary hearing on September 19-20, 1983, before the October 20 disqualification order, he was aware or should have been aware that his suit would be frivolous because of the judicial immunity doctrine. His complaint therefore contained no legal or factual foundation.

Specifically, the district court held that "plaintiff did not make a reasonable inquiry into the factual . . . basis of his claims" because he had received an evidentiary hearing before Magistrate Carr on September 19-20, 1983. The court said:

> "Counts IV, V, VI, and VII deal with the alleged denial of a hearing before the Magistrate made his recommendation to Judge Walinski, yet the Court finds ample evidence to the contrary in the record. The Magistrate's own Report and Recommendation of October 20, 1983 (recommending, *inter alia,* the disqualification of Mr. Affeldt), states that a pretrial conference was held on the matter, and that a hearing was held on September 19 and 20, 1983. Deft's Doc. App. 165-166. In addition to these oral representations to the Magistrate, counsel, including Mr. Affeldt, had sufficient opportunity to submit written pleadings to the Magistrate. In light of this record, plaintiff's allegations cannot be viewed as being well-grounded in fact and law, as Rule 11 requires."
>
> [App. F, p. 5.]

The factual record completely refutes this factual finding. The petitioner did not bring his suit until 18 months after the October 20, 1983 order, complaining about the

invasion of First Amendment rights with the successor law firm. The disqualification order had been standing for over 18 months. There was no banning of communication until August 2, 1984 and the successor law firm was not in the case until 1984. It was impossible to have drafted such a complaint about disqualification in 1983, for there was no prior restraint until August 2, 1984.

The court's adoption of the appellee's argument that petitioner-appellant had other adequate legal remedies is fallacious. It is a legal axiom that a prior restraint order such as the one issued in this case causes irreparable harm, which cannot be cured by other legal remedies. *Elrod v. Burns*, 427 U.S. 347 (1976); *Hague v. C.I.O.*, 307 U.S. 496 (1939). Such a vague, overbroad, and unjustified order is null and void and immediately subject to injunctive relief. An appeal in this case would not have cured the irreparable harm caused by the magistrate's prior restraint order. Under *Gardner v. Westinghouse Corp.*, 437 U.S. 478 (1981), it was not possible to appeal the dismissal of the class action in the petitioner's OCF case until the individual cases were litigated, which could take years. Further, the order had an immediate crushing impact not only upon the values of speech and association of the appellant-petitioner, class representatives and class members, but also upon their right to counsel of their own choice, and the right of appellant to practice law in the City of Toledo. These wrongs could not have been remedied by a court two to three years later. "To support, as Gulf does, that these individuals would not be harmed by this delay is to ignore the realities of the case." 30 *DePaul Law Rev.* 917, at 931, n. 78. It would be a mockery

of justice and a complete disregard for the realities of power politics to argue that a decisionmaker has the right to issue a vague order and then later interpret that order in a fashion as to violate fundamental First Amendment rights and then defend by contending that appeal is the appropriate remedy. This would constitute an open invitation for any decisionmaker to circumvent the First Amendment. The point is that the prior restraint order was null and void *ab initio* and a court has the affirmative duty to declare it null and void *ab initio,* which is the only way to protect these fundamental rights. No evidence of control was found by the magistrate, only isolated instances of speech and association with the successor law firm in non-related Title VII cases. Even if no irreparable harm had occurred in this case, other remedies were plainly inadequate. The appellant's petition for mandamus was denied. Recusal was impossible since the appellant-petitioner was not an attorney of record in any case before the magistrate and appeal to the district court would have been futile since that court had agreed with the magistrate on all of his recommendations.

It is thus obvious that the petitioner-appellant stated a good cause of action in his complaint accusing the magistrate of issuing a prior restraint order which banned without any analysis all communication in the form of speech and association with the successor law firm. Once there exists a legal and factual foundation to petitioner's complaint, no finding of improper purpose can be made. *Zaldivar, et al. v. City of Los Angeles,* Slip Op. No. 84-6238, 780 F.2d 823 (9th Cir. 1986).

II. THE DOCTRINE OF *Pulliam v. Allen* IS APPLICABLE TO THIS CASE AND THUS THE MAGISTRATE WAS NOT PROTECTED BY THE DOCTRINE OF JUDICIAL IMMUNITY WHEN HE ISSUED HIS PRIOR RESTRAINT ORDER

The purpose of Rule 11 is to discourage frivolous filings and the misuse of legal procedures for harassment purposes, while at the same time not interfering with the filings of legitimate complaints and motions. It is a salutary tool designed for the extraordinary case of abuse of the judicial process. *Jones v. Continental Corp.*, — F.2d —, 40 FEP Cases 1343 (6th Cir. 1986). Rule 11 is not intended to "chill an attorney's enthusiam or creativity in pursuing factual or legal theories." (Advisory Committee Notes, F.R.Civ.P. Rule 11.) The burden of proof for a petitioner is heavy, for he must overcome the rebuttable presumption of a valid paper by showing that the motion or complaint had no facts or possible set of facts, or no legal or possible (colorable) legal claims. The petitioner must prove that there is no arguable factual or legal foundation. "The basic question we must answer is whether plaintiffs have an arguable claim, even if that legal argument may ultimately fail." *Zaldivar, et al. v. City of Los Angeles,* Slip Op., No. 84-6238, at p. 18, 780 F.2d 823 (9th Cir. 1986).

In this case, as has been demonstrated, the petitioner's complaint was both well-grounded in fact and warranted by existing law. The claim for injunctive relief, the *Pulliam* claim, was more than an arguable claim. It was a winning claim, but it was not once recognized or considered by the courts and as such it is inconceivable how the courts con-

cluded that the petitioner-appellant filed a frivolous complaint.

"Well-grounded" facts are clearly asserted in the complaint, alleging a violation of the First and Fifth Amendments because of the magistrate's prior restraint order banning all communication between the law firm and the appellant. [App. C.] The district court never focused on this prior restraint order, but only on the disqualification order which was never asserted to violate constitutional rights. Terming the attack upon the disqualification order as frivolous is not an attack on the complaint. The circuit court also failed to consider the appellant's attack on the prior restraint order. Thus it was not possible for both courts to conclude that the complaint was frivolous.

The appellant's complaint clearly spelled out all the elements of a *Pulliam* cause of action—a federal offical invading without justification fundamental First Amendment constitutional rights resulting in irreparable harm. The district court's dismissal of the complaint "with prejudice" was a gross violation of constitutional rights, for in so dismissing the court was saying that no possible principle of law or set of facts could save the complaint. Under this Court's decision in *Foman v. Davis,* 371 U.S. 178, 182 (1962), the district court had an affirmative duty to come forward with a justifying reason for so dismissing the complaint. It gave no reason. The Sixth Circuit conceded that a *Pulliam* cause of action had been spelled out but held that the facts did not support the cause of action. This was error, for under Rule 12(b)(6) factual inadequacy cannot be a reason for dismissing the complaint, only Rule 56(c).

III. THE CIRCUIT COURT ABUSED ITS JUDICIAL ROLE AS LAID DOWN BY THIS COURT IN *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), AND *Icicle Seafoods, Inc. v. Larry Worthington, et al.*, 54 LW 4357 (4-21-86)

It is essential that the respective roles of the district court and the circuit courts be kept separate and distinct if the legal process is to be workable. The instant case is a classic case of confusion and intermingling of judicial roles. In *Anderson*, this Court held that the factfinding role, in the first instance, lies with the district court. In *Icicle Seafoods, supra*, this Court held that a circuit court can reverse if it finds the facts to be clearly erroneous or remand if the district court failed to make findings of fact essential to resolve the legal question.

In the instant case the circuit court found that the record did not support the district court's conclusion that the appellant was attacking the magistrate's disqualification order as violating his constitutional rights. The circuit court should have made a clearly erroneous finding, but instead it engaged in a separate factfinding expedition which was also clearly erroneous. It agreed with the appellant that the complaint attacked the magistrate's August 2, 1984 prior restraint order and that it contained a valid *Pulliam* cause of action, at least in legal theory. It held, however, that *Pulliam* did not apply on the facts of the case—that the complaint was restricted to the alleged ban between the appellant and the parties. It failed to discuss the ban between the appellant and the successor law firm. The court below also held that "the appellant assisted

successor counsel in the preparation of the class action suit", an assertion completely refuted by the record.

The thrust of the Sixth Circuit's opinion is that the doctrine of *Pulliam v. Allen* is applicable to federal magistrates; that the appellant's complaint was directed to the magistrate's August 2, 1984 order; that it contained a valid *Pulliam* cause of action; that the *Pulliam* doctrine would have applied in this case if the facts showed that the magistrate had banned all communication between appellant and the parties and that the *Pulliam* doctrine does not apply if the record shows that the magistrate banned all communication between the appellant and the successor law firm. The record in this case, both the magistrate's August 2, 1984 opinion and the appellant's complaint, conclusively prove that the magistrate did exactly that—prohibited all communication, speech and association, without justification, causing irreparable harm between the appellant and the successor law firm.

It is respectfully submitted that the issues raised in this case go to the very heart of the functioning of the legal process. The time has come for this Court to come forth with guidelines on the proper application of Rule 11. A tension exists between the values of respect for the judicial process and for the preservation of our adversary system. Many courts are equating losing claims with frivolous claims and even winning claims with frivolous claims. Seminars and law review articles abound, for there is great concern about the impact of these decisions on the attorney client relationship. Prior restraint orders and gag orders have their place in a democracy, but only in those extraordinary situations where they are justified by higher

social values. If they can be issued without justification, we have a police state. Our legal process depends upon the proper functioning of the lower and higher courts and if their respective roles break down, confusion reigns. When district courts fail in the function of a fact finder, refuse to address the issues mandated by the record, and accept libelous evidence, it is the function of the circuit court to reverse under the clearly erroneous doctrine and not assume the role of fact finder.

Clarification of these issues would not only speed up the machinery of justice but lessen considerably the workload of this Court.

For all these reasons petitioner requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

ROBERT J. AFFELDT, ESQ.

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Petitioner

APPENDIX A

No. 86-3831/3874

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT J. AFFELDT, Plaintiff-Appellant, v. MAGISTRATE JAMES G. CARR, Defendant-Appellee	ORDER (Filed October 15, 1987)

BEFORE: KENNEDY, WELLFORD and MILBURN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ORDER OF THE COURT
OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

Nos. 86-3831, 86-3874

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT J. AFFELDT,

Plaintiff-Appellant,

v.

MAGISTRATE JAMES G. CARR,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Ohio.

(Filed August 24, 1987)

/

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be *prominently* displayed if this decision is reproduced.

Before: KENNEDY, WELLFORD, and MILBURN, Circuit Judges.

PER CURIAM. Plaintiff-appellant, an attorney, appeals the District Court's order imposing sanctions against him pursuant to Rule 11 of the Federal Rules of Civil Procedure. The court awarded Magistrate Carr ("appellee") sanctions after dismissing appellant's complaint for injunctive and monetary relief against appellee pursuant to Rule 12(b)(6). We affirm.

Appellee was assigned, pursuant to appellant's request, to consider discovery and non-dispositive matters

in a racial discrimination in employment class action. Appellee presided at a hearing on September 19, 1983 concerning the financial arrangement between the named plaintiffs[1] in that class action and appellant. Following this hearing, appellee issued an order requiring the parties to address the issue of appellant's adequacy as class counsel in light of the evidence at the hearing. Appellee then issued a Report and Recommendation setting forth his findings of fact and conclusions of law. He found, *inter alia*, that prior to the time of the class action plaintiffs undertook to serve as class representatives, appellant failed to inform them of the costs of bringing suit, failed to explain the meaning of the word "costs," failed to respond adequately to the named plaintiffs' requests for itemization and verification of costs, had brought suit in state court against the former class representatives to recover costs he had incurred, and had failed to inform appellee in a timely manner about the nature of the state court dispute between himself and the class action plaintiffs. Appellee concluded that appellant should be disqualified as counsel for the class, should be directed to make available to the named and successor plaintiffs all files, documents, and other materials relating to the case, that some class representatives should be removed, and that appellant's motion to designate Jane Kyser and Grace Kyser Belgili as representatives of the class be granted upon

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[1]Appellant brought claims on behalf of Jane Kyser and Grace Kyser Belgili both individually and as would-be class representatives. On August 5, 1983, appellant filed motions to withdraw as counsel for Dorothy Sharp, Ellen Clark, Rebecca Welch, and Valerie Wright and to remove these individuals as class representatives. Appellant later filed suit in state court against Sharp, Clark, and Welch to recover fees and costs incurred as a result of the class action.

the condition that counsel independent from appellant represent the class. The district court adopted this Report and Recommendation and entered the recommended order.

The defendant in the class action then filed a motion to deny class certification on the grounds that successor counsel obtained by the named plaintiffs were not independent of appellant. While this motion was pending, appellee requested information relating to the state court suit filed by appellant against the former class representatives. This information was necessary because it became apparent that the successor class counsel represented appellant in this state court action. Appellee then found that the named plaintiffs permitted appellant to play a substantial role in the selection of successor counsel and appellant assisted successor counsel in the preparation of the class action suit. He also found that appellant had transferred a number of class action discrimination cases to successor counsel in which appellant remained of counsel and appeared at pretrial conferences. Successor counsel acknowledged a lack of experience in Title VII lawsuits, class action and federal court litigation, and that they would look to appellant for the principal and primary source of instruction, guidance and direction. In view of this close relationship, the magistrate concluded that successor counsel were not in fact independent. Additionally, appellee found that successor counsel employed appellant's former paralegal who had worked on the case with appellant a substantial amount of time. Consequently, appellee recommended to the district court that the named plaintiffs had failed to comply with the court's mandate to seek independent counsel and that the class action should not be

certified. The district court adopted this Report and Recommendation.

Appellant filed a class action against appellee alleging that appellee, without notice or an evidentiary hearing, recommended the disqualification of appellant as a class attorney and contended that appellee's recommendation that the class representatives seek other counsel independent of appellant constituted a "gag order." Appellant also contended that appellee entered into a conspiracy with three Toledo law firms to recommend dismissal of all class action lawsuits in which appellant was counsel or of counsel. Appellant further contended that these suits were dismissed without a hearing and that appellee adopted arguments wholesale from appellant's opponents. Additionally, appellant contended that appellee assicated with members of the firms who opposed appellant in several class action cases, and that appellee called upon these firms to conduct an investigation into appellant's legal and personal activities.[2] Appellant also contended that appellee's denial of class certification without a hearing interfered with the class members' constitutional right to an impartial tribunal. Finally, appellant contended that appellee knowingly deprived appellant and other class members of their constitutional rights and "carried out such policy with a malicious intent to cause a deprivation of funda-

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[2]Appellant contends that appellee's orders requiring the defendant in the class action to submit additional materials with respect to its motion to disqualify successor counsel and the order requiring appellant to submit materials relating to the action filed by appellant against the former class representatives were improper.

mental constitutional rights." Appellant sought $6,000,000 in damages and injunctive relief.

On October 2, 1985, the District Court granted appellee's motion to dismiss with prejudice for failure to state a claim under Fed. R. Civ. P. 12(b)(6), and subsequently issued an Order setting forth its findings in the case. *Affeldt v. Carr*, 628 F. Supp. 1097 (N.D. Ohio 1985). The court examined each of the allegedly invalid acts of appellee and concluded that appellee was entitled to judicial immunity since he had subject matter jurisdiction to issue such orders and these orders were judicial acts. In regard to the claim that appellee acted in a prosecutorial fashion, the court examined appellee's orders and found that appellee did not order any investigation. Appellee was considering the class action defendant's motion to disqualify appellant and merely asked it to supplement the record to support its motion. The District Court noted that such requests to supplement the record assist the court in rendering an informed decision and are not in the nature of orders for an independent investigation. With respect to appellant's request for injunctive and declaratory relief, the court concluded that appellant failed to demonstrate any threat of irreparable harm or injury.[3] Additionally, the court concluded that appellant did not establish that he had an inadequate remedy at law inasmuch as appellant could have sought either a direct appeal from the orders or appellee's recusal or disqualification.

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[3]The court, relying on *Pulliam v. Allen*, 466 U.S. 522 (1984), recognized that judicial immunity is not a bar to prospective relief against a judicial officer acting in a judicial capacity.

On January 24, 1986, the District Court held a hearing to consider appellee's motion for sanctions against appellant pursuant to Rule 11 and its inherent powers to prevent bad-faith abuse of the judicial process. On April 24, 1986, the court issued an Order granting this request and denied appellant's request for sanctions under Rule 11. *Affeldt v. Carr,* 111 F.R.D. 337 (N.D. Ohio 1986). Considering the entire record, the court concluded that appellant failed to make a reasonable inquiry into the factual and legal basis of his claims before initiating his suit against appellee as required by the Rule, that the suit was frivolous, and resulted in substantial delay and prejudice to the parties. With respect to the portion of the complaint seeking relief due to appellee's recommendation that appellant be removed as class counsel and that independent counsel be sought, the court found that these were clearly judicial acts authorized by Rule 23 of the Federal Rules of Civil Procedure. With respect to the conspiracy claim, the court noted that the law is well-established that a judge is entitled to immunity even if he or she acts with partiality, malice, or in a corrupt fashion. *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 348 (1871). The court also noted that appellant, without any basis in law or fact, sought to deny the District Court's power pursuant to Rule 23(a)(4) to declare certain individuals unacceptable representatives of certain classes of litigants. The court also concluded that appellant filed the action for improper purposes—to interfere with the resolution of certain cases and to obtain something that appellant was denied through normal procedures such as a motion for recusal. Finally, the court found that appellant had ample opportunity to be heard before appellee made his recom-

mendation to the District Court; thus, his allegations that he was denied a hearing before appellee took certain actions were not well-grounded in fact or law.[4] The District Court later awarded appellee $14,249 in legal fees and $43.05 in costs. The instant appeal is solely from that award.[5]

On appeal appellant contends that the doctrine of judicial immunity is not clearly established and therefore the court should not have awarded sanctions under Rule 11. With respect to the conspiracy and prosecutorial claims, appellant contends that he could have provided additional facts in an amended complaint to support these allegations and the court erred in dismissing his complaint with prejudice. With respect to his claims for injunctive relief, appellant contends that the court erred in three respects. First, appellant contends that the court's order was inconsistent: the judge concluded that the doctrine of judicial immunity did not apply to claims for injunctive relief against a judicial officer but dismissed this aspect of the complaint because appellee's acts were protected by this doctrine. Second, appellant contends that the court misunderstood the portion of his complaint dealing with the alleged gag order. Appellant argues that the order applied to speech and association taking place during judicial proceedings and in the future. Appellant further con-

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[4]The court noted that appellee held a hearing on September 19 and 20, 1983, and that appellant could have submitted written pleadings to appellee following this hearing.

[5]Appellant did not file a timely appeal from the District Court's 12(b)(6) dismissal. Thus, this Court's review is limited to the question of whether the court erred in awarding sanctions under Rule 11.

tends that the District Court erroneously viewed the complaint as not challenging the order with respect to its effect on future speech and association, but only on the actual proceedings. Appellant thus views the order as an invalid prior restraint, restricting speech in advance of publication.[6] Finally, appellant argues that the doctrine enunciated in *Pulliam v. Allen*, 466 U.S. 522 (1984), applies to United States magistrates thus making the doctrine of judicial immunity inapplicable to a request for injunctive relief.

Appellant also contends that the court's conclusion that he had an opportunity to respond to the charges resulting in his disqualification and the alleged gag order was clearly erroneous. First, appellant contends that the testimony during the September 19 hearing was limited to the removal of the three class representatives, and appellee ordered appellant not to make any attempt to defend himself or his conduct as class counsel.[7] Although appellee permitted the parties to brief the issue of appellant's disqualification after the hearing, appellant contends that this was an insufficient opportunity to respond to these charges. Appellant contends that appellee and the District Court should have allowed him to confront and cross-examine the three accusers whose testimony resulted in appellant's disqualification and the order for independent successor

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[6]Appellant further contends that the disqualification order was unappealable and that it was impossible for him to move for appellee's recusal because appellant was not the attorney of record in any case.

[7]At this hearing, appellee considered the motion made by appellant in the class action discrimination case to remove three initial class representatives.

counsel during the September hearing. Appellant also contends that the court, before imposing Rule 11 sanctions, prohibited him from demonstrating that his complaint had a factual and legal foundation. Additionally, appellant contends that the court improperly imposed sanctions because it had no "independent or direct evidence of bad faith," but simply concluded that appellant possessed bad faith because he lacked a factual or legal foundation for filing his complaint.

Appellant, relying on this Court's decision in *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), also contends that the court erred in denying him an evidentiary hearing on the reasonableness of attorney fees and costs and awarding such fees and costs without supportable facts or documentary evidence. He argues that appellee could not be awarded attorney fees because he was sued in his official capacity. Finally, appellant contends that the District Judge should have recused himself from this case because of bias. According to appellant, at the January 29, 1986 hearing the judge made comments indicating that he was going to find for appellee and comments regarding the autonomy and supremacy of federal judges. Appellant further contends that the following are evidence of the District Judge's bias: he adopted appellee's arguments with respect to several issues; he denied appellant's motion for discovery and/or an evidentiary hearing with respect to the reasonableness of attorney fees; and he denied appellant's request to discover the role of appellee's attorney as a consultant to the court in another matter.

Rule 11 provides in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Fed. R. Civ. P. 11. The purpose of this Rule is to require "[g]reater attention by the district courts to pleading and motion abuses and . . . [to] impos[e] . . . sanctions when appropriate, . . . discourage . . . abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." Advisory Committee Note, Fed. R. Civ. P. 11. The Rule is also "intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney." *Id.*

Under Rule 11, sanctions may be imposed if a reasonable inquiry discloses the pleading, motion, or paper is (1) not well grounded in fact, (2) not warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, *or* (3) interposed for any improper purpose such as harassment or delay. *INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc.*, 815 F.2d 391 (6th Cir. 1987); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985). The standard used in evaluating an alleged Rule 11 violation is an objective one.

INVST Fin. Group, 815 F.2d at 401; *Albright v. Upjohn Co.* 788 F.2d 1217, 1221 (6th Cir. 1986). Although Rule 11 sanctions are mandatory once the trial court finds a violation, the court has considerable discretion in selecting the type of sanction once a violation is found. *Albright,* 788 F.2d at 1221-22. A trial court's decision whether the pleading, motion, or paper is legally sufficient receives *de novo* review inasmuch as it involves a question of law. *Westmoreland,* 770 F.2d at 1175.

The District Court found that appellant violated all three provisions of Rule 11. Appellee correctly notes that any one of the findings would be sufficient to impose sanctions. The District Court correctly determined that appellant's complaint was not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . ." 111 F.R.D. at 340-41. Appellee's recommendation that appellant be disqualified as a class attorney in the discrimination action and that the class representatives seek independent counsel were clearly judicial acts protected by the doctrine of judicial immunity. Similarly, appellee's alleged prosecutorial and conspiratorial acts were also protected by this doctrine. As this Court has noted, "No immunity doctrine affecting persons is more strongly established than that of judicial immunity." *Kurz v. Michigan,* 548 F.2d 172, 174 (6th Cir.), *cert. denied,* 434 U.S. 972 (1977).[8] Furthermore, even if appellee failed to give appellant an opportunity to chal-

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[8]The doctrine of judicial immunity clearly applies in this case because appellee did not act in the clear absence of jurisdiction, his acts were normally performed by a judge, and the parties dealt with appellee in a judicial capacity. *Stump v. Sparkman,* 435 U.S. 349, 359 (1978).

lenge the disqualification recommendation, this act is also protected by the doctrine of judicial immunity. All of appellee's reports and recommendations were reviewed by the district court.

Appellant contends that appellee ordered him not to "contact" or "associate" with the parties in the discrimination case and that this constituted a prior restraint resulting in appellant having to "leave the State of Ohio and the City of Toledo. . . ." Although the Supreme Court in *Pulliam* held that the doctrine of judicial immunity is not a bar to prospective injunction relief against a judicial officer acting in her judicial capacity, *Pulliam*, 466 U.S. at 541-42, the *Pulliam* decision does not apply in the present case. The magistrate did not order appellant not to contact or associate with the parties in the class action case. He could continue to represent individual plaintiffs; he could advise them regarding the selection of new counsel. Appellee's recommendation to the court was that it should order the class representatives to seek independent successor counsel. Appellee later found that the successor counsel in that case were not independent from appellant. That finding was amply supported by the record. This order was thus not a prior restraint or a gag order; it was merely a recommendation that successor counsel were too closely associated with appellant to be seen as independent; their appointment did not comply with the previous court order requiring the class representatives to seek independent counsel.

Appellant also contends that the District Court failed to follow adequate procedures before imposing sanctions. This contention is also without merit. Appellant responded

to appellee's motion for sanctions and filed his own motion for sanctions. The District Court held a hearing to consider these motions. Although this proceeding was not an evidentiary hearing, neither Rule 11 or due process requires such a hearing. *Oliveri v. Thompson,* 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied,* 107 S. Ct. 1373 (1987); *McLaughlin v. Bradlee,* 803 F.2d 1197, 1205 (D.C. Cir. 1986). The District Judge had presided over the case, and it is apparent that there was a full and clear basis upon which he could determine, without an evidentiary hearing, whether sanctions were appropriate because appellant's complaint was not warranted by existing law or a good faith argument for changing existing law.

Appellant's final alleged errors are also without merit. First, the District Court correctly found no basis for granting appellant's motion for sanctions. Second, the award of attorney fees for appellee was proper even though he is a United States Magistrate. *Campana v. Muir,* 786 F.2d 188, 191 (3d Cir. 1986). Finally, although appellant contends that the District Judge should have recused himself from the case, appellant did not comply with the requirements of 28 U.S.C. § 144 (1982). Additionally, none of appellant's claims of bias support a finding of partiality requiring disqualification in the absence of a party complaint under 28 U.S.C. § 455.

Accordingly, the judgment of the District Court is AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT J. AFFELDT 7540 Bay Islands Drive—So. Bermuda Building, Apt. 262 St. Petersburg, FL 33707, *et al.*, Plaintiffs,	Civil Action No. C 85-7459 JOHN W. POTTER JUDGE
vs.	
MAGISTRATE JAMES G. CARR United States District Court Northern District of Ohio, Western Division Toledo, Ohio 43624, Defendant.	COMPLAINT (Filed April 30, 1985)

JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to the First Amendment rights of freedom of speech and the right of association, the Fifth Amendment, the right to counsel and the right to equal protection under the law and the right to an unbiased tribunal. The jurisdiction of this Court is also invoked pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 1343(4), and 28 U.S.C. Sections 2201 and 2202.

PARTIES

2. The plaintiff, Robert J. Affeldt, is a former law professor who taught at the universities of Connecticut,

Kentucky and Toledo, for eighteen years. He has been a consultant to and conciliator for the Equal Employment Opportunity Commission (EEOC) and a Director of Conciliation for the civil rights division of the Department of Housing and Urban Development (HUD). He is a licensed practicing attorney in the State of Ohio practicing Title VII law.

3. The defendant, James G. Carr, a former law professor at the University of Toledo Law School is presently a Magistrate for the Federal District Court in the City of Toledo, Northern District of Ohio, Western Division.

CLASS ACTION

4. Plaintiff brings this action on behalf of himself and on behalf of all other persons similarly situated as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

5. The other individuals similarly situated include all persons who in the past have been the victims of the Magistrate's unconstitutional policy and who are presently the victims of the Magistrate's unconstitutional policy and who are presently the victims and who will be the victims of that policy in the future. These include the class members, class representatives, and attorneys for these class representatives and class members. The Magistrate's pattern and practice of dismissing class actions without an evidentiary hearing when disputed facts exist, of depriving plaintiffs and class members of their choice of counsel, of penalizing them when they exercise their constitutional rights of free speech and association, constitutes illegal action which affects all class members and satisfies the

commonality and typicality provisions of Rule 23 of the Federal Rules of Civil Procedure. The victims number over three-hundred (300) and are too numerous to be brought before this Court and thus joinder is impracticable.

6. If individual class members were to institute separate proceedings, such adjudication with respect to the individual members' suits would be dispositive of the interest of other class members to protect their interest and would create the possibility of inconsistent adjudication.

7. The actions of the Defendant with regard to Plaintiff as alleged herein are generally applicable to the class as a whole, and final declaratory and injunctive relief will be appropriate with respect to the class as a whole.

8. All of the substantial questions of law and fact pertaining to the claims of Plaintiff are common also to the claims of the class members.

9. The questions of law governing Plaintiff's suit are identical to those which would be presetned by other class members.

10. Plaintiff's allegations are typical of the claims of all the class members and are based upon factual situations similar in each instance arising out of the unconstitutional conduct by the Defendant as alleged herein.

CAUSE OF ACTION—COUNT I
FIRST AND FIFTH AMENDMENT VIOLATIONS

11. In September of 1983 the Magistrate without providing the Plaintiff with the two most fundamental requisites of due process, notice or a reasonable oppor-

tunity to be heard in the form of an evidentiary hearing, disqualified the Plaintiff as a class attorney in the case of *Sharp, et al. v. Owens Corning Fiberglas,* C80-450. He based this decision on the testimony of two perjured witnesses and when it was pointed out to him that these witnesses had recanted their testimony, he refused to consider this evidence.

12. The Magistrate ordered the class representatives to seek other independent counsel who would not speak to or associate with former counsel. When the class representatives hired the lawfirm of JOSEPH W. WESTMEYER JR. CO., L.P.A., the Magistrate not only disqualified the lawfirm from acting as class counsel but disqualified the plaintiffs from acting as class representatives. This gag order issued by the Magistrate materially interfered with the First Amendment rights of the plaintiff, class representatives, class members, and their class attorneys.

13. Each time new class representatives hired the lawfirm of JOSEPH W. WESTMEYER JR. CO., L.P.A., the Magistrate disqualified the lawfirm as class counsel and the plaintiffs as class representatives.

14. This pattern and practice of issuing gag orders which constitutes prior restraint upon speech and association without providing an evidentiary hearing to the class and their attorneys constitutes a flagrant *per se* violation of fundamental constitutional rights of due process. These actions have recently been condemned by the Supreme Court. See *Cleveland Board of Educ. v. James Loudermill, et al.,* 53 LW 4306 (S.Ct. 1985). His policy and practice has also interfered with the property rights of the class

representatives and class members and of the attorneys and constitutes a serious intrusion of the attorney-client relationship.

COUNT II—THE MAGISTRATE IS IN LEAGUE WITH THREE (3) LARGE LAWFIRMS IN THE CITY OF TOLEDO AND HAS CONSPIRED WITH THEM TO DEPRIVE PLAINTIFF AND THE CLASS OF THEIR CONSTITUTIONAL RIGHTS

15. The Magistrate has entered into a conspiracy with three large lawfirms in the City of Toledo to dismiss all class action lawsuits in which the plaintiff is counsel or "of counsel". He has permitted these lawfirms to participate in the decision of the selection of the class representatives, a practice which clearly constitutes a conflict of interest. In dismissing all these actions without an evidentiary hearing when facts are in dispute and lifting verbatim the arguments and opinions of these defendant lawfirms in their briefs he has interefered with the due process rights of the plaintiff and the class.

16. The Defendant has associated with members of the firms who have opposed the Plaintiff in these class actions suits and has permitted a member of one of these firms to represent his wife and still litigates before him.

COUNT III—PLAINTIFF AND CLASS MEMBERS HAVE A RIGHT TO SELECT COUNSEL IN CIVIL ACTIONS

17. The Magistrate by denying class members their right to select their own counsel and providing them with an opportunity to voice their views has interefered with their constitutional right to counsel.

COUNT IV

18. The Magistrate while dismissing the class and individual actions without providing notice or an evidentiary hearing has deprived Plaintiff and the members of the class their due process rights in violation of the Fifth Amendment.

COUNT V

19. The Magistrate by writing opinions denying class certification before evidentiary hearings has interfered with the plaintiff and the class members' constitutional right to an impartial tribunal.

COUNT VI

20. The Magistrate at all times not only should have known, but did know that his unconstitutional actions and/or policy and practice constituted bias and that his arbitrary and unsupportable actions violated clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 815 (1982). The Magistrate carried out such policy with a malicious intent to cause a depriviation of fundamental constitutional rights.

COUNT VII

21. The Magistrate's failure to provide an evidentiary hearing on disputed facts involving petitioner's fundamental constitutional rights violates petitioner's due process rights and hence all the Magistrate's orders proceed-

ing from such deprivations including that of prior restraint gag orders were void orders and as such, subjects the Magistrate to compensation for monetary damages.

RELIEF

22. WHEREFORE, Plaintiff and the members of the class respectfully request this Court to grant the following relief:

a. Certify a class of persons who are being subjected to irreparable harm by a gag order and the invasion of their substantive and procedural due process rights;

b. Enjoin the Magistrate from ever in the future issuing orders infringing upon fundamental constitutional rights as freedom of speech and association and from depriving them of their constitutional rights without an evidentiary hearing;

c. Declare that Magistrate's actions unconstitutional;

d. Award Plaintiff reasonable attorney fees and costs and such other and further relief that seems reasonable to this Court; and

e. Award petitioners monetary damages in the amount of six million dollars ($6,000,000.00) for violating the petitioners' constitutional rights of due process by issuing orders without having jurisdiction.

JURY DEMAND

23. Plaintiff respectfully requests this matter be set down for trial before a jury.

/s/ R. J. Affeldt
Robert J. Affeldt
Plaintiff-Attorney

7540 Bay Islands Drive—So.
Bermuda Building, Apt. 262
St. Petersburg, FL 33707
(813) 360-0797

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT J. AFFELDT,	)	C85-1319
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	
MAGISTRATE JAMES G. CARR,	)	ORDER
	)	
	)	
Defendant.	)	(Filed October 2, 1985)
	)	
Battisti, C.J.	)	

On May 6, 1985, plaintiffs filed a complaint in the above action alleging that defendant, a federal magistrate serving in the Western Division of this Court violated their constitutional rights of speech and association, right to counsel, equal protection under the law and right to an "unbiased tribunal." Complaint at 1. On May 9, 1985, defendant moved for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that plaintiffs have failed to state a cause of action and that defendant is immune from this suit as a consequence of being a judicial officer exercising the duties of his office.

In light of the serious allegations of this complaint, the Court has determined that in the best interest of the parties and the administration of justice, it will issue this brief order indicating its findings in the case. A more detailed opinion setting out findings of fact and conclusions of law will follow seasonably. The Court is very sensitive

to the issues at play in this action and is appreciative of counsels' thorough briefing of the matter. In this respect, the Court will of course discharge its obligation to fully state its views and reasoning in a subsequent memorandum opinion.

In light of the foregoing, the Court has considered the various pleadings and has determined that the instant action should be dismissed with prejudice. The conduct for which defendant stands accused indeed falls within the exercise of his office and was appealable in the fist instance. The doctrine of judicial immunity is indeed applicable in the instant case.

Accordingly, defendant's motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12 (b)(6) is granted with prejudice.

IT IS SO ORDERED.

/s/ Frank J. Battisti
Chief Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT J. AFFELDT, et al.,	)	C85-1319
	)	
Plaintiffs,	)	
	)	
-vs-	)	
	)	ORDER
MAGISTRATE JAMES G. CARR,	)	
	)	
	)	(Filed November
Defendant.	)	5, 1985)
	)	
Battisti, C.J.	)	

On October 2, 1985, this Court issued a brief order granting defendant's motion for summary judgment and dismissing plaintiff's complaint with prejudice. At that time, the Court stated that it would issue an opinion seasonably in order to state fully the grounds for its decision. In recognition of the important issues raised in this case and the Court's obligation to the litigants, the following opinion sets out the basis for the order of October 2, 1985.

I.

On May 6, 1985, plaintiff filed the instant complaint, alleging violation of First Amendment rights of free speech and association, Fifth Amendment equal protection rights and Sixth Amendment rights to counsel and an "unbiased tribunal." Plaintiff, for himself and over 300 class members, alleges that Magistrate James G. Carr deprived them of their rights in the course of proceedings before him

which occurred in September 1983. Plaintiffs pray for an injunction against the Magistrate prohibiting him from infringing upon plaintiffs' constitutional rights; a declaratory judgment that the Magistrate's actions were unconstitutional; and $6,000,000 in monetary damages plus reasonable attorney's fees and costs.[1]

On May 9, 1985, defendant moved to dismiss the case with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). On May 28, 1985, plaintiff responded to defendant's brief.

Plaintiff invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1331 (diversity of citizenship, whereby plaintiff is a Florida resident and defendant is an Ohio resident); 28 U.S.C. § 1343(4) (original jurisdiction "to recover damages or . . . other relief under an Act of Congress providing for the protection of civil rights"); and 28 U.S.C. §§ 2201, 2202 (jurisdiction of "any court of the United States" to make declaratory judgments). Jurisdiction is proper in this Court.

II.

Plaintiff is a former law professor who taught at various universities, including the University of Toledo, for eighteen years. He is a licensed attorney in the State

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1. This case was originally assigned to Judge John Potter in the Western Division of the Northern District of Ohio. On May 1, 1985, however, Judge Potter and Judge Walinski transferred this case to the Eastern Division for reassignment on the grounds that their "close working relationship [with] Magistrate Carr would make it inappropriate for any of the judges of the Western Division to hear this action." On May 6, 1985, Chief Judge Frank J. Battisti was assigned the case.

of Ohio, who, in his own words, "practices Title VII law." Defendant, formerly a law professor at the University of Toledo Law School, has been a fulltime Magistrate of the United States District Court for the Northern District of Ohio, Western Division sitting in Toledo since September 29, 1979.

Plaintiff alleges that the Magistrate engaged in a "pattern and practice of dismissing class actions without an evidentiary hearing when disputed facts exist, of depriving plaintiffs and class members of their choice of counsel, of penalizing them when they exercise their constitutional rights of free speech and association." Complaint at 3. Specifically, plaintiff states that in September 1983, the Magistrate without providing plaintiff notice or an evidentiary hearing, disqualified the plaintiff as a class attorney in *Sharp v. Owens Corning Fiberglass*, C80-450. Plaintiff contends that the Magistrate's decision was based on the testimony of two perjured witnesses and that the Magistrate refused to reconsider when he learned the testimony had been recanted.

Plaintiff contends that in the same case, the Magistrate ordered the class representatives to "seek other independent counsel who would not speak to or associate with former counsel," namely, the plaintiff. Complaint at 4. Plaintiff interprets this action as a "gag order." He contends that when the law firm of Joseph W. Westmeyer, Jr. & Co., L.P.A. was retained, the Magistrate not only disqualified that law firm from acting as class counsel but also disqualified the plaintiffs from acting as class representatives.

In the second count of his complaint, plaintiff contends "[t]he Magistrate has entered into a conspiracy

with three large law firms in the City of Toledo to dismiss all class action lawsuits in which the plaintiff is counsel or 'of counsel.' " Complaint at 5. Plaintiff contends these actions were dismissed without an evidentiary hearing with facts still in dispute and that the Magistrate adopted arguments and opinions wholesale from briefs of the parties opposed to plaintiff. In addition, plaintiff alleges that the Magistrate "has associated with members of the firms who have opposed the plaintiff in these class action suits and has permitted a member of one of these firms to represent his wife and still litigates before him." Complaint at 6.

Counts III and IV of the Complaint repeat charges of interference with the right to counsel and due process. In Count V, "plaintiffs contend the magistrate, by writing opinions denying class certification before evidentiary hearings, has interfered with the plaintiff and class members' constitutional right to an impartial tribunal." Count VI alleges that the Magistrate knowingly deprived plaintiffs of constitutional rights and "carried out such policy with a malicious intent to cause a deprivation of fundamental constitutional rights."

III.

Defendant moves to dismiss with prejudice on the grounds that plaintiff has failed to state a cause of action. Specifically, defendant contends that the doctrine of judicial immunity warrants dismissal of the instant action and that there are adequate remedies at law, namely, appellate proceedings, which would permit plaintiff to receive redress of any injuries he may have sustained.

The Supreme Court has consistently held since 1868 that judges are absolutely immune from civil suits for

damages. *See, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. [13 Wall.] 335 (1871); *Randall v. Brigham*, 74 U.S. [7 Wall.] 523 (1868). The doctrine was established "to protect the finality of judgments from continual collateral attack in courts of competing jurisdiction [footnote omitted] and to protect judicial decisionmaking from intimidation and outside interference." *Pulliam v. Allen*, —U.S.—, 104 S. Ct. 1970 (May 14, 1984) (Powell, J. dissenting) (slip op. at 3-4). The immunity doctrine is based on the notion that the "burdens of litigation," including the time, costs, and anxiety expended in defending oneself in a suit, would pose a threat to judicial independence and decisiveness. *Id.* (dissent at 5). However, while emphasizing that judicial immunity barred damage actions, see *Pulliam*, majority slip op. at 13-14, 13 n. 15, the majority of the Supreme Court held that judicial immunity does not bar prospective injunctive relief against a judicial officer. *Pulliam* specifically held that judicial immunity does not bar an award of attorney's fees against a judicial officer. *Id.* at 20-21.

Since plaintiff asks for both monetary and injunctive relief, this Court will first examine the issue of damages.

A.

JURISDICTION

The standards for the applicability of judicial immunity have most recently been restated in *Martinez v. Winner*, 771 F.2d 424, 434-36 (10th Cir. August 22, 1985), and *King v. Love*, 766 F.2d 962, 965-68 (6th Cir. July 3, 1985). The essential prerequisites to immunity are that the

judge not act in the clear absence of all jurisdiction and that he be performing a judicial act. *Stump v. Sparkman*, 435 U.S. 349, 359; *Pierson v. Ray*, 386 U.S. 547, 553-54. The judge must have both subject matter jurisdiction of the matter before him and personal jurisdiction over the defendant. *Stump*, 435 U.S. at 357-59; *Bradley v. Fisher*, 80 U.S. [13 Wall.] 335, 351-52; *Cuiska v. City of Mansfield*, 250 F.2d 700, 702 (6th Cir. 1957); *Kenny v. Fox*, 232 F.2d 288 (6th Cir), *cert. denied sub. nom, Kenny v. Killian*, 352 U.S. 855 (1956).

Hence, this Court must examine each of the acts complained of and determine whether the defendant was acting within his jurisdiction. In undertaking this inquiry, it must be noted that the "scope of a judge's jurisdiction must be construed broadly," *Stump*, 435 U.S. at 356, and that even though federal courts are courts of limited jurisdiction, federal judicial officers are absolutely immune from damages even if they act in excess of their jurisdiction. *King v. Love*, 766 F.2d at 967.

Plaintiff alleges that defendant engaged in misconduct in the case of *Sharp v. Owens Corning Fiberglass*, C80-450, which was filed in the United States District Court for the Northern District of Ohio, Western Division. Plaintiff is listed as counsel for plaintiffs in *Sharp*. The case, which was designated a class action seeking to enforce a claim of racial discrimination in employment under 42 U.S.C. § 1981 and Title VII, was filed on July 21, 1980. The case was assigned to district Judge Nicholas Walinski. The docket sheet indicates numerous filings in this action between July 1980 and April 1982. On April 21, 1982, Judge Walinski denied the preliminary injunction sought by

plaintiffs. Plaintiff appealed to the Sixth Circuit Court of Appeals on April 28, 1982. On October 6, 1982, plaintiff filed a motion for recusal of Judge Walinski. On November 23, 1982, plaintiff's motion for recusal was denied. On December 1, 1982, plaintiff moved to transfer all discovery and non-dispositive matters.

On December 2, 1982, Judge Walinski granted plaintiff's motion to transfer all discovery and non-dispositive matters to the Magistrate. The Magistrate assigned to the judges of the Western Division is James G. Carr, the defendant in the instant case.

It was, then, by plaintiff's own motion that he consented to defendant's supervision and jurisdiction over his case. There appears to be nothing unusual in the way this matter was assigned to the Magistrate. Hence, plaintiff had consented to the Magistrate's jurisdiction. Furthermore, plaintiff admits in his Response to Defendant's Motion to Dismiss ("Response") that "it is acknowledged that the Magistrate has subject matter jurisdiction over the Title VII lawsuit. . . ." Response at 11. Plaintiff goes on to state, however, that the Magistrate lacked subject matter jurisdiction to issue the "disqualification and gag orders." *Id.*

Under 28 U.S.C. § 636(b)(1)(A), "a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion . . . to dismiss or to permit maintenance of a class action. . . ." Subparagraph (B) goes on to state that "a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the dis-

position, by a judge of the court, of any motion excepted in subparagraph (A)."

The issuance of orders disqualifying counsel and the issuance of gag orders are indeed pretrial matters which do not fall within the exception of 28 U.S.C. § 636(b)(1)(A). The Magistrate, therefore, had subject matter jurisdiction to issue such orders.

B.

JUDICIAL ACTS

Plaintiff, however, argues that "[s]ince the disqualification and gag orders were not preceded by an evidentiary hearing . . . these acts by the Magistrate were non-judicial in nature. . . ." Response at 8. The standard for determining whether an act is "judicial" was set out in *Stump v. Sparkman*, 435 U.S. 349, 362, as "one relat[ing] to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." Using these two factors, it is clear that the magistrate's acts were indeed "judicial" in nature since the issuance of gag orders and rulings on counsel's continued representation of a client are both prerogatives of a judge.

The thrust of plaintiff's contention, however, is that since the defendant did not conduct an evidentiary hearing prior to making his decisions, these decisions were based on prejudice. In the first instance, a judicial officer is not required to hold a hearing prior to issuing a gag order. Gag orders fall within the Court's prerogative to maintain appropriate decorum in the administration of justice and

protect the rights of the litigants from prejudice. *See Sheppard v. Maxwell,* 384 U.S. 333 (1966); *In re Oliver,* 452 F.2d 111 (7th Cir. 1971). Furthermore, gag orders do not violate a party's free speech rights. *United States v. Tijerina,* 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969). There must simply be evidence or findings that the judicial officer finds imminent prejudice to the administration of justice. *In re Oliver, supra.* As most recently noted in *Martinez v. Winner,* a judge is ultimately responsible for controlling the atmosphere at proceedings and is immune for acts taken in furtherance of that duty. *Martinez,* 771 F.2d at 434-35.

Similarly, the power and duty to disqualify counsel are exercised by a judge as a condition of the federal court's power to regulate the professional conduct of attorneys admitted to its bar. *Ceramco Inc. v. Lee Pharmaceuticals,* 510 F.2d 268, 270-271 (2d Cir. 1975); *In re Gopman,* 531 F.2d 262, 266 (5th Cir.), *reh'g denied,* 542 F.2d 575 (1976). The trial court's obligation is to prevent any potential conflict of interest. *Tucker v. Shaw,* 378 F.2d 304 (2d Cir. 1967).

Plaintiff also states that the defendant performed various "ministerial or administrative duties" to which he is not entitled to judicial immunity. Response at 8. This Court does not regard any of the actions listed by plaintiff on page 9 of his Response as "ministerial." The signing of protective orders, granting or refusing permission to take depositions, and awarding or denying interest on attorney's fees awards all go directly to the conduct of discovery, pretrials and the administration of a judgment. These actions could scarcely be called anything less than

"judicial," for they lie at the heart of a trial court's duties. *See Martinez,* 771 F.2d at 434.

Citing the case of *Lopez v. Vanderwater,* 620 F.2d 1229 (7th Cir. 1980), plaintiff analogizes defendant's conduct to the exercise of "prosecutorial powers." Response at 6-7. The test enunciated in *Sevier v. Turner,* 742 F.2d 262, 272 (6th Cir. 1984), is "whether initiating accusatory processes such as criminal prosecutions or civil contempt proceedings is a function normally performed by a judicial officer." (Citing *Stump* at 362.) Plaintiff complains that in his orders of July 17 and July 18, 1984, "the Magistrate called upon the defendant's law firm to conduct an investigation into the legal and personal activities of attorney Affeldt. . . ." Response at 7. An examination of the orders, attached as exhibits to plaintiff's Response, does not show the Magistrate ordering any investigation. Rather, what appears is the Magistrate grappling with defendant's motion to disqualify Affeldt. The Magistrate states that "it appears that certain readily ascertainable facts are in dispute, and that those facts may have some pertinence to the resolution in question." July 19, 1984 Order at 1. The Magistrate asks defendant to supplement the record in support of this motion. *Id.* at 2. Such requests to supplement the record are made to assist the Court in rendering an informed decision; such requests are not in the nature of orders for independent investigations.

This Court will not at this time initiate a *de novo* review to determine whether the Magistrate's requests were appropriate or overbroad in the sense that the materials requested were more than necessary for rendering his decision. As stated by the Sixth Circuit in *Sevier v. Turner,*

742 F.2d 262, 271 (6th Cir. 1984), "a judicial officer does not act in the clear absence of all jurisdiction if he merely acts in excess of his authority." There is no indication in this case that the defendant acted in a manner outside either his authority or jurisdiction. Ultimately, the conduct complained of here can be distinguished from those cases where judges order "independent investigations of crimes occurring outside their courtrooms." *See Martinez,* 771 F.2d at 435. Thus, the Magistrate did perform judicial acts which were within his jurisdiction; consequently, he is entitled to absolute judicial immunity as to the alleged damages for his acts.

Plaintiff contends that the Magistrate's acts are part of a "conspiracy" (Count II of Complaint), and are motivated by "malicious intent" (Count VI of Complaint). He states that they were "simply a continuation of the vendetta which the Magistrate had previously waged against attorney Affeldt [plaintiff] at the University of Toledo Law School." Response at 8. This Court will not consider such allegations. It is well-established that a judge is entitled to immunity even if he acted with partiality, maliciously or corruptly. *Bradley v. Fisher,* 80 U.S. [13 Wall.] 335, 348 (1871). Even if a judge has prejudged a matter before him, judicial immunity applies. *Martinez,* 771 F.2d at 435. Given plaintiff's allegations, it is surprising that he would not only consent to the defendant's supervision and jurisdiction over pre-trial matters but would move for the Magistrate's participation in the first instance. The Court does not wish to permit actions against judges and magistrates to become a post-judgment mechanism for losing parties to seek review of final orders. Allegations of bias, which can appropriately be addressed in a recusal mo-

tion, would proliferate if such charges could serve as the basis for a successful suit. Such a system would disrupt the very finality of judgments which the doctrine of judicial immunity was originally intended to secure.

IV.

INJUNCTIVE & DECLARATORY RELIEF

Plaintiff's complaint also seeks declaratory and injunctive relief against defendant. As stated earlier, "judicial immunity is not a bar to prospective relief against a judicial officer acting in her judicial capacity." *Pulliam v. Allen*, 104 S.Ct. 1970, slip. op. at 18. To obtain equitable relief, plaintiff must show that he has an inadequate remedy at law and a serious risk of irreparable harm. *Id.* at 14. Plaintiff has failed to make such a showing.[2] Indeed, all the acts of which plaintiff complains could have been appealed either directly or by extraordinary writ. The statute granting jurisdiction to magistrates provides appeal not only to the district judge but to the Court of Appeals. The statute explicitly states that there shall be no limitation on a party's right to appeal a magistrate's decision to the United States Supreme Court. *See* 28 U.S.C. §§ 636 (c)(4) and (c)(5). Plaintiff could have exercised his rights of appeal in the context of *Sharp v. Owens-Corning*.[3]

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2. Plaintiff contends that he has demonstrated irreparable harm by alleging "invasion of First Amendment rights." Response at 16. This Court has already found, however, that the "gag orders" and disqualification rulings do not in themselves constitute infringements of the First Amendment.

3. There is an indication on the record that plaintiff did file an appeal to the Sixth Circuit. Plaintiff appears, however, to have moved for voluntary dismissal of that appeal, which was granted by the Sixth Circuit on May 30, 1985.

Further, as defendant has correctly noted at page 19 of his brief in support of the motion to dismiss, plaintiff could also have sought recusal or disqualification of the Magistrate under 28 U.S.C. §§ 144 and 455 as an alternative or in conjunction with direct appeal and extraordinary writs under the All Writs Act. 28 U.S.C. § 1651.

Finally, plaintiff has not demonstrated any threat of irreparable harm or injury. This Court believes greater harm would be caused to the administration of justice and the ability of the Magistrate to perform his duties were it to issue the broad injunctive and declaratory relief sought by plaintiff. Accordingly, plaintiffs prayer for injunctive and declaratory relief is denied.

V.

In conclusion, defendant's motion to dismiss for failure to state a claim under Fed. R. Civ. Pro. 12(b)(6) is granted; plaintiff's complaint against defendant is barred by the doctrine of judicial immunity and is dismissed with prejudice.

IT IS SO ORDERED.

/s/ Frank J. Battisti
Chief Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT J. AFFELDT,	)	C85-1319
	)	
Plaintiff,	)	ORDER
	)	
-vs-	)	(Filed April 24, 1986)
	)	
MAGISTRATE JAMES G. CARR,	)	
	)	
Defendant.	)	

BATTISTI, C.J.

In its barest essentials, this lawsuit concerns a dispute arising from an attorney's dissatisfaction with a federal judge's ruling, which disqualified plaintiff from representing a putative class in legal proceedings based on alleged employment discrimination. Plaintiff expressed his dissatisfaction with the judge and magistrate handling his cases in the United States District Court for the Northern District of Ohio, Western Division in a wide variety of ways. First came attempts to remove the judicial officers presiding over plaintiff's cases in the form of motions for recusal. When these were denied, plaintiff resorted to harsher methods, such as the filing of lawsuits, mandamus actions, and even formal complaints under 28 U.S.C. § 372. The filing of this lawsuit permitted plaintiff to achieve his primary goal in these matters: recusal of Magistrate James G. Carr from hearing cases in which plaintiff is acting either as counsel of record or of counsel for particular parties.

In considering defendant's Motion Requesting Imposition of Sanctions, the Court finds appropriate the Magistrate's own language when he recommended to Judge Nicholas Walinski that plaintiff be disqualified from representing certain class members: "Upon consideration, I am persuaded that a direct, albeit drastic stroke is the most feasible solution to these problems." *See Sharp v. Owens Corning Fiberglas Corp.*, C80-450 (Magistrate's Report and Recommendation, Oct. 20, 1893, *reprinted in* Documentary Appendix Submitted in Support of Defendant's Motion for Imposition of Sanctions ("Deft's Doc. App.") 166-167). The imposition of sanctions in this case against plaintiff indeed constitutes a direct, drastic stroke to curb serious abuses of the judicial process by plaintiff. For the reasons stated below, defendant's Motion Requesting Imposition of Sanctions against plaintiff is hereby granted pursuant to Fed. R. Civ. P. 11 and the Court's inherent power to prevent bad-faith abuse of the judicial process. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

* * *

Rule 11 reads in pertinent part as follows:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motoin or upon its own initia-

> tive, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The text of Rule 11 was amended in 1983, and some of those amendments are important in this present matter. As the Advisory Committee Note explains,

> The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation . . . . Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

Advisory Comm. Note, 97 F.R.D. 165, 198.

One example of the rule's change is the requisite standard of good faith. The former text made reference to willfulness as a prerequisite to disciplinary action. An inquiry into the reasonableness of the actions under the circumstances replaced this requirement. Advisory Comm. Note, 97 F.R.D. at 198 (citing *Kinee v. Abraham Lincoln Federal Savings & Loan Ass'n*, 365 F. Supp. 975 (E.D. Pa. 1973)). "This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation." 97 F.R.D. at 199 (citing *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980)). Although this requisite level of in-

quiry apparently is the same for *pro se* litigants, as Mr. Affeldt, the Advisory Committee notes that "the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations." 97 F.R.D. at 199 (citing *Haines v. Kerner*, 404 U.S. 519 (1972)). The Court takes notice of the fact that plaintiff is an attorney.[1]

Upon consideration of the record before it, the Court hereby concludes that plaintiff did not make a reasonable inquiry into the factual and legal basis of his claims before initiating this lawsuit against the Magistrate, as required by Fed. R. Civ. P. 11.

A brief summary of the allegations made by plaintiff against the Magistrate sufficiently supports this holding.[2] Count I of the Complaint describes plaintiff's dissatisfaction with the Magistrate's recommendation that plaintiff be removed as class counsel and that independent counsel

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1. There is a split among the circuits on the issue whether an objective or subjective good faith standard is required in an analysis of Rule 11 sanctions. *Compare Gieringer v. Silverman*, 731 F.2d 1271 (7th Cir. 1984), and *Wells v. Oppenheimer & Co.*, 101 F.R.D. 358. *See also* Moore's Federal Practice ¶ 11.02[2] (supp. to Vol. 2A). In taking into consideration special circumstances relevant to plaintiff in this case and in examining improper purpose, the Court here effectively considers both standards and nevertheless finds the plaintiff to have violated Rule 11. Consequently, it is unnecessary to decide at this time whether Rule 11 mandates only an objective or subjective standard of good faith.

2. A further elaboration of each count, as well as a discussion of the doctrine of judicial immunity as applied in this case, can be found in the Court's Order of November 5, 1985 which sets out the reasons for granting defendant's Motion for Dismissal. References in that Order to defendant's "Motion for Summary Judgment" should properly read "Motion for Dismissal."

be sought. Such recommendations by the Magistrate, and such action ultimately adopted by the district judge, are clearly judicial acts. Moreover, Fed. R. Civ. P. 23 gives a district court ample authority to take such action to ensure that the interests of a particular class are adequately and fairly represented. Certainly a Magistrate can make a recommendation to a district judge pursuant to the Court's general authority under Rule 23. Admittedly, the action taken by Judge Walinski was unfavorable to plaintiff. Nevertheless, one versed in the simplest outline of our judiciary would surmise that a party cannot sue a judicial officer outright merely because an unfavorable decision is handed down. Any court can reasonably expect an attorney to be at least somewhat familiar with the appellate process, and to know that appeals to unfavorable decisions are not made through independent lawsuits against the judicial officer rendering such decisions.

Count II alleges a conspiracy between the Magistrate and certain law firms in the City of Toledo. As the Court noted in its November 5, 1985 opinion in this case, a judge is entitled to immunity even if he or she acts with partiality, maliciously, or corruptly. *Bradley v. Fisher*, 80 U.S. [13 Wall.] 335, 348 (1871). Our judicial system could never tolerate lawsuits against judicial officers who issue unfavorable opinions and then who are accused of improper or illegal behavior. Plaintiff went beyond the typical remedy in such a situation, a motion for recusal, even though such additional steps were unwarranted, improper, and unreasonable.

Count III has no reasonable basis in law in that plaintiff seeks to deny a district court its power to declare cer-

tain individuals unacceptable representatives of certain classes of litigants. *See* Fed. R. Civ. P. 23(a)(4). It would indeed be difficult to draft this particular civil rule, which vests courts with the type of power exercised by Judge Walinski, any more clearly.

Counts IV, V, VI, and VII deal with the alleged denial of a hearing before the Magistrate made his recommendation to Judge Walinski, yet the Court finds ample evidence to the contrary in the record. The Magistrate's own Report and Recommendation of October 20, 1983 (recommending, *inter alia*, the disqualification of Mr. Affeldt), states that a pretrial conference was held on the matter, and that a hearing was held on September 19 and 20, 1983. Deft's Doc. App. 165-166. In addition to these oral representations to the Magistrate, counsel, including Mr. Affeldt, had sufficient opportunity to submit written pleadings to the Magistrate. In light of this record, plaintiff's allegations cannot be viewed as being well-grounded in fact and law, as Rule 11 requires.[3]

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3. Plaintiff filed a Motion for Leave to Amend Complaint on March 19, 1986. While the Court does not deny that at times a plaintiff is permitted to amend the complaint even after a motion for dismissal has been granted, the preferable procedure is to move the court to reopen its judgment. 3 Moore's Federal Practice ¶ 15.10. This procedure would appear to be most appropriate in a case as the instant one, since the Court entered a final judgment in this case in the form of a rather lengthy opinion. It was clear from that opinion that all matters were conclusively adjudicated at that time. Neither the defendant nor the Court should have to wait four months for another attempt by plaintiff to reopen this matter, especially in light of the fact that plaintiff's Motion for Reconsideration was denied on January 7, 1986.

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Even if one moves beyond an objective standard for determining the reasonableness of plaintiff's action in filing this lawsuit, no special circumstances have been presented in this particular case which lead the Court to modify its holding. Indeed certain special circumstances in this case strongly suggest that plaintiff acted out of a subjective bad faith in filing this lawsuit against the Magistrate.

At the heart of plaintiff's complaint lies his dissatisfaction with the Magistrate's recommendation and Judge Walinski's order removing plaintiff as class representative. Our judicial system does not permit, nor can it tolerate, a procedure whereby a particular decision is reversed by suing the individual who initially recommended such a decision. A *pro se* litigant untrained in the law may not immediately think of this systemic limitation, but a licensed attorney should. To put it quite simply, plaintiff, as an attorney, should have known better.

Plaintiff's bad faith also manifests itself in the blunderbuss approach in which he attempted to reach, and ultimately did achieve, his objective of having the Magistrate recuse himself. Although plaintiff argued at the

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More important to the resolution of this pending motion is the fact that plaintiff fails to cure any of the defects of the original Complaint through the amendments. Plaintiff does not successfully answer the Court's analysis on the law of judicial immunity, for example, by merely condensing separate counts into longer paragraphs. Even as amended, the Court would be required to dismiss this suit for many of the same reasons, if not the identical reasons, enunciated in its November 5, 1985 opinion.

Accordingly, plaintiff's Motion for Leave to Amend Complaint is hereby denied.

hearing on sanctions, held on January 29, 1986, and elsewhere that there were no other remedies available other than the filing of a lawsuit against the Magistrate,[4] he did file three days after initiating this lawsuit a mandamus action and a complaint under 28 U.S.C. § 372 with the Sixth Circuit Court of Appeals against the Magistrate.[5] Prior to these filings, plaintiff had removed for the recusal of Judge Walinski (denied November 23, 1982 in *Sharp v. Owens Corning Fiberglas Corp.*, C80-450), and of the Magistrate (denied November 28, 1983 in *Prude v. Toledo Trust Corp.*, C82-170).[6]

* * *

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4. *See, e.g.*, Transcript to January 29, 1986 Hearing (the "Transcript") 32, 39.

5. These actions were dismissed because, according to defendant's filings in this case, the Sixth Circuit viewed these filings as an effort to bypass conventional appellate remedies. *See* Deft's Supplemental Post-Hearing Brief 2.

6. These two recusal motions are apparently only the proverbial tip of the iceberg. According to an affidavit filed by counsel in *Prude v. Toledo Trust Company*, C82-170, a case assigned to Judge Walinski, plaintiff filed no fewer than 50 motions for recusal against judicial officers in the Northern District of Ohio. *See* Deft's Doc. App. 284-286. Nine of those motions were against the Magistrate, the most recent of which were filed less than a week after plaintiff initiated this lawsuit. This large number of recusal motions alone reflects bad faith on the part of the plaintiff, and is difficult to square with plaintiff's statement during the recent hearing that "[h]e certainly has the highest regard for the judicial process and is not an outlaw whatsoever in that respect." Transcript 21.

The Court is also disturbed by plaintiff's suggestions during the recent hearing that he was taking a very active role in the cases from which he sought the removal of the Magistrate (and presumably Judge Walinski), and that his denial of status as class counsel effectively ended his Title VII practice at least in

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By failing to make a reasonable inquiry into the factual and legal background of his lawsuit against the Magistrate, plaintiff violated Rule 11. For this reason, the Court accordingly grants defendant's request for the imposition of sanctions in this case. This particular example of procedural abuse, however, presents a more troublesome factual situation than merely a failure on the part of a party to make a reasonable inquiry into the facts and law of a case before filing.

By signing a pleading, motion, or other paper, an attorney or party certifies that, in addition to having undertaken a reasonable inquiry, the pleading, motion, or other paper is "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

> This implies an element of subjective bad faith. Although purpose to harass might sometimes be inferred

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Toledo. *See* Transcript 19, 22, 24, 26, 44. Defendant has brought to the Court's attention letters between plaintiff and his clients which indicate plaintiff's intention to withdraw from the cases in question, or at least to reduce significantly his role in those cases, far before this case was brought. The reasons for withdrawal appear to be both personal and professional in nature but unrelated to this case. Deft's Supp. Post-Hearing Brief 3-5. On January 9, 1984, plaintiff moved to withdraw as counsel in certain cases before the Magistrate. Plaintiff stated in his motion to withdraw that "it would be in the best interest of his clients that they obtain new counsel" because of plaintiff's "new and time-consuming projects outside the City of Toledo." Pltf's Reply to Post-Hearing Brief, Ex. B. Although plaintiff now contends that "there was no intention to withdraw until the sweeping prior restraint order was issued by the Magistrate on October 20, 1983, which gave the plaintiff no choice but to withdraw," *id.* 4, no mention was made of this order in plaintiff's motion to withdraw.

> from the totally baseless nature of a claim, under the revised rule this could hardly be so unless the signing attorney or party had also misrepresented the factual and legal sufficiency of the claim. Therefore to fall within the 'improper purpose' language it will usually be necessary to demonstrate some subjective bad faith.

2A Moore's Federal Practice ¶ 11.02[2] n.7 (1985).

Upon consideration of the record before it, the Court concludes that plaintiff filed the instant action against the Magistrate for certain improper purposes including: to interfere with the resolution of certain cases then being handled by the Magistrate and Judge Walinski; and to obtain the Magistrate's recusal, something which plaintiff was denied through normal procedures such as a motion for recusal.

In his order of July 31, 1985 in *Prude v. Toledo Trust Co.*, C82-170, the Magistrate indicated that his recusal of May 3, 1985 (three days after the instant action was filed) was necessary solely because of plaintiff's conduct against him, as reflected in this lawsuit and the mandamus and § 137 actions. "It is unquestionably unfortunate that as a result of their misconduct, Mr. Affeldt and his colleagues accomplish a result to which they are not otherwise entitled." *Id.* at Deft's Doc. App. 270. This ill-founded lawsuit virtually assured the Magistrate's recusal.[7]

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7. In his order of July 31, 1985, the Magistrate examined the law applicable to recusal. He concluded, "Most simply put, the unusual spectacle of an attorney having sued the presiding officer and sought to deprive him of his tenure might cast an in-

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No court can tolerate such conduct on the part of the members of its bar, unless it is willing to tolerate significant delays in litigation, prejudice to parties, and unnecessary burdens on its time. All of these things have resulted from plaintiff's initiating this frivolous lawsuit. The recusal of the Magistrate through the filing of this instant action as well as filings against Judge Walinski's participation in cases in which plaintiff was either counsel of record or of counsel have shifted many of these matters to Judge Potter's docket. Transcript 10; Deft's Motion Requesting Imposition of Sanctions 28. This shift has precipated its own obvious delays. Furthermore, there is evidence indicating that the Magistrate's recusal from at least one case, *Prude v. Toledo Trust Company,* C82-170, has prejudiced the parties. *See* Affidavit of Rolf H. Scheidel, Deft's Doc. App. 273. This is the unfortunate but inevitable result when a judicial officer, who has been involved in complex litigation for years, is suddenly removed from a case and prohibited from further participation.

Related to the Court's powers to impose sanctions under Rule 11's provision concerning improper purpose is the Court's inherent power to prevent bad-faith abuse of the judicial process. The United States rule of requiring each party to pay its own attorney's fees, *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240 (1975), nevertheless permits a court to assess fees against a party for

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delible shadow across the ability of a reasonable person to have full confidence in such judge's impartiality." Deft's Doc. App. 268-269. In short, the Magistrate felt compelled to recuse himself after the plaintiff initiated this lawsuit, and this Court agrees with the Magistrate's interpretation of the law on this point.

willful disobedience of a court order, or when the losing party has acted in bad faith. As the Supreme Court recently stated in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980):

> The power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes.

Id. at 766.

The discussion above amply supports a finding of bad faith in the filing of this lawsuit by plaintiff. He abused the judicial process to obtain an end to which he was not entitled. In conducting himself in this manner, plaintiff disturbed the judicial process of this district. And because plaintiff is both a party and an attorney, the Court exercises its supervisory powers over both litigants and the practicing bar when dealing with plaintiff's bad-faith filing in this particular case. The sanction is a severe one, commensurate with the severe abuse which has taken place in this case.

* * *

In light of the findings in this case and pursuant to the Court's inherent powers and its explicit powers under Rule 11, plaintiff is hereby ordered to pay reasonable expenses incurred by defendant as a result of this lawsuit, including a reasonable attorney's fee. Defendant noted in his Motion Requesting Imposition of Sanctions that he would submit a final statement of fees and costs for the Court's approval should his motion be granted. If defendant's counsel chooses to supplement his affidavit of February 12, 1986,

he shall do so by filing a brief final statement of fees and costs within fifteen (15) days of the issuance of this Order. If defendant files such a brief final statement, plaintiff shall have fifteen (15) days after service of defendant's statement to respond and comment briefly. An order, which specifies the dollar amount to be paid to defendant by plaintiff, shall issue after appropriate consideration of such final statements by the Court.

Defendant's counsel has pointed out that the Magistrate's costs incurred in this proceeding would ordinarily be paid by the United States under 28 U.S.C. § 463. As a practical matter, then, the Magistrate would likely have incurred no personal expenses in defending himself in this case even if the Court had decided not to impose sanctions against plaintiff. Defendant is instructed to keep this fact in mind when calculating reasonable expenses and fees incurred in this litigation as well as reasonable attorney's fees. The imposition of sanctions in this case, through the exercise of the Court's inherent powers and its explicit powers under Rule 11, may be a direct and drastic stroke, but it must not be an unreasonable one. *See* Fed. R. Civ. P. 11.

* * *

Plaintiff has made his own request for separate sanctions against defendant for defendant's filing of his Motion Requesting Imposition of Sanctions. Plaintiff's Motion for Sanctions is hereby denied, as the Court finds defendant's motion to be well-taken for the reasons stated above.

IT IS SO ORDERED.

/s/ Frank J. Battisti
Chief Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Dorothy Sharp, et al.,

Plaintiffs,

vs.

Owens Corning Fiberglas Corp.,

Defendant.

C 80-450

Magistrate's Report and Recommendation (Filed October 20, 1983)

This is an employment discrimination case which, along with related cases which have been consolidated by prior order, has been referred to the undersigned for hearing and determination of pretrial matters. Pending in this cause are motions filed by the present attorney for the class, Robert J. Affeldt, for leave to withdraw as counsel for four of the named plaintiffs (one of whom, apparently, has withdrawn from the litigation), and to substitute other named plaintiffs in the place of the current named plaintiffs. Mr. Affeldt, by means of these motions, seeks to continue to represent the class, but not the currently named plaintiffs.

Three of the named plaintiffs oppose Mr. Affeldt's motion and desire to continue to serve as class representatives. They have retained counsel, Francis Gorman, who, in turn, seeks to act as counsel for the class.

Upon receipt of Mr. Affeldt's motion to withdraw as counsel for the named plaintiffs, I set a pretrial conference in order to become generally informed about the events which had led to the filing of that motion. Following that pretrial conference, a hearing was set for September 19, 1983. The issues to be considered at said hearing were delineated in an Order entered on September 8, 1983.

For the reasons which follow, I conclude that, based upon the record of the hearing held on September 19 and 20, 1983, both the named plaintiffs and Mr. Affeldt fail to satisfy the requirement of Fed. R. Civ. P. 23(a)(4) that they be shown to be adequate representatives of the class. I recommend that this court disqualify Mr. Affeldt as class counsel and remove the three named plaintiffs as class representatives. I recommend further that leave be granted to two new parties and a current named plaintiff to proceed conditionally as representatives of the putative class pending resolution of the pending class certification motion.

Because matters relating to class certification are dispositive in nature, the result of my consideration of the issues raised initially by Mr. Affeldt's pending motions is submitted for further review by the Honorable Nicholas J. Walinski in the form of a Report and Recommendation.

Before turning to a discussion of the facts as disclosed during the September 19th hearing, two observations would appear to be in order. The first is that the circumstances which confront this court appear to be unique. The parties have not cited and research has failed to uncover a reported decision presenting similar, much less the same factual picture as that which was developed during the hearing. The

second observation is that the issues raised by the motions filed by Mr. Affeldt and related litigation which he has undertaken against the named plaintiffs in the Lucas County Court of Common Pleas create a veritable Gordian Knot of complex problems. Upon consideration, I am persuaded that a direct, albeit drastic stroke is the most feasible solution to these problems.

The basis for this recommendation is to be found in the facts developed at the evidentiary hearing on September 19 and 20, 1983. Briefly summarized, that record shows a complete failure on the part of Mr. Affeldt to explain, at the time each plaintiff agreed to participate as a class representative, the nature of the financial commitment which was being undertaken. As a consequence, assent to serve as class representatives was not made knowingly or intelligently. Following this shaky start, disputes, principally caused by Mr. Affeldt's failure to respond to requests for itemized cost statements and related inquiries, developed and were permitted to increase in severity. No notice was given by Mr. Affeldt to this court of these problems until after he had filed his suit against the named plaintiffs in the Common Pleas Court.

At the evidentiary hearing two of the named plaintiffs indicated that earlier testimony by them during depositions had not been truthful. With reference to the third named representative, it is apparent that she does not have the financial resources to enable her to participate in this action while defending simultaneously the lawsuit filed against her and the other named plaintiffs. In addition, it is apparent that the effort required to defend that lawsuit will be demanding and pose a significant danger for all three named plaintiffs of distracting them from fulfill-

ment of their duties to the class. These circumstances suffice to disqualify the current named plaintiffs as class representatives, just as Mr. Affeldt's conduct leads to the conclusion that he should not be permitted to continue to serve as attorney for the class.

I.

Factual Background and Findings

A.

Background

Each of the three named plaintiffs whose further participation as class representative is being challenged by Mr. Affeldt's motions testified about her understanding of her role as a class representative and of the agreement which she had reached with him concerning reimbursement for costs, her desire and ability to continue to serve as a class representative, and her position relative to the lawsuit which Mr. Affeldt has filed in the Lucas County Common Pleas Court.

The first of the named plaintiffs to testify was Ellen Clark Hixenbaugh. Mrs. Hixenbaugh testified that, as a result of a concern that she was about to lose her job, she went to Mr. Affeldt's office on March 12, 1980. At that time she met with Helen Kendrick, an associate with the office, who told Mrs. Hixenbaugh that she did not have a viable case. Two weeks later, Ms. Kendrick called Mrs. Hixenbaugh, telling her that she had spoken with Mr. Affeldt, who said that she had a really good case.

During that conversation, Mrs. Hixenbaugh asked Ms. Kendrick about fees and costs, expressing concern in light

of her imminent unemployment. Ms. Kendrick told her that the case could be taken on a contingent basis, and the costs would not exceed $500 for her own deposition.

Thereafter, in August, 1980, Mrs. Hixenbaugh met with Mr. Affeldt for the first time. She informed him that she did not have a lot of money; he told her not to worry about it. On February 14, 1981, after her class action complaint had been filed, and a few days before her deposition was to be taken, Mrs. Hixenbaugh signed a fee agreement with Mr. Affeldt (Pl. Exh. 1).

During a meeting on that date, one of the other named plaintiffs, Rebecca Welch Weitzman, sought to discuss the matter of fees with Mr. Affeldt. This discussion ended with Mrs. Weitzman departing in tears.

After her deposition had been taken, Mrs. Hixenbaugh received and paid for the bill for that deposition. Thereafter, she received and paid her share of bills for twelve to fifteen depositions which had been taken of Owens-Corning personnel and officials.

On October 5, 1982, Mr. Affeldt's office submitted a statement captioned "Costs of Litigation" (Pl. Exh. 2) and a demand for installment payments (Pl. Exh. 13) to the three named plaintiffs. Mrs. Hixenbaugh testified that she and her co-plaintiffs had not been aware of many of the expenses before they had been incurred. Several items on the statement led to question from the three named plaintiffs, who requested explanation and verification of the expenditures. On October 15, 1982, the named plaintiffs wrote to Mr. Affeldt requesting itemization, invoices, and payroll copies for the various items contained on the "Costs of Litigation" statement. In addition, the named

plaintiffs informed Mr. Affeldt that they desired to be advised before additional expenses were incurred (Pl. Exh. 3).

Thereafter Mr. Affeldt sought to obtain revised fee agreements from each of the three named plaintiffs. On December 23, 1982, he wrote to them indicating that if the revised agreements were not signed and returned, he would withdraw from their case, they would be expected to pay $24,000 in costs, and suit would be filed to collect that amount if it were not paid (Pl. Exh. 4). The letter did not contain an itemization of the $24,000 figure.

On December 28, 1982, following several telephone calls from the named plaintiffs, Mr. Affeldt again wrote to each of them "to make my position as clear as I can." In part, that letter stated:

> On September 29, 1982 all of you were advised in a meeting in my office of the necessity of your bearing and sharing the costs of this litigation on an on-going basis . . . On October 5, 1982 you were . . . asked to revise our fee agreement so that this office would be covered for all costs and expenses even those which had to be advanced. . . .
>
> My letter to you of December 23 reaffirmed my present position that if we have no agreement as to the payment of the costs of this litigation, and as of the moment we do not, and since I am legally foreclosed from underwriting any litigation, then I indeed cannot represent clients—especially those who purport to be class representatives—who are either unwilling or unable to pay. . . .
>
> If you have any further questions in this matter, you may direct them to Attorney William Moore, who has agreed to handle the collection aspects of this case for me.

(Pl. Exh. 6.)

Thereafter, on New Year's Eve, 1982, Mr. Hixenbaugh and Mr. Weitzman, husbands of two of the named plaintiffs, met with Mr. Affeldt. As a result of that meeting, the amount on the "Costs of Litigation" statement was amended to $5,884.94, to be divided among six plaintiffs. In addition, further expenses for an expert, estimated by the expert to be $1,500, were approved at that time.

Following this meeting, there were further meetings in early 1983, and the payment, by means of modest checks, of various amounts by the named plaintiffs. During this period the plaintiffs had advised Mr. Affeldt that they did not want further substantial costs incurred without their consent. He, in turn, informed them that they should not be making payments to him in the form of checks for small sums.

On cross-examination by Mr. Affeldt, Mrs. Hixenbaugh testified that it had been her understanding at the outset that all costs were to be paid after the case had been settled, and that Mr. Affeldt had told her not to worry about the costs. Later in time, she testified, Mr. Affeldt made the named plaintiffs aware that they had to pay costs in order to support the class action litigation. But, at the time she signed her first fee agreement, she understood only that she would have to pay for her deposition and the filing fee to bring the action in this court.

Moreover, Mrs. Hixenbaugh stated, had she been aware of what was encompassed under the term, costs, and of her obligation to reimburse for such costs, she would not have filed her lawsuit as a class action. In response to other questions by Mr. Affeldt, she testified:

> I'm trying to explain to you my feelings, okay. I didn't know what is involved in a lawsuit. I never

> even had a traffic ticket. I didn't know who paid it [*i.e.*, costs]. You kept telling me up front not to worry about money. You won't have to put anything up front. You have to pay your own deposition. That's all I was told by you.

(Tr. 63-4.)

At this point, Mrs. Hixenbaugh was asked by Mr. Affeldt the following question:

> When you signed the fee agreement, did it say anything about you only being responsible for your deposition, [Mrs. Hixenbaugh]?

To which Mrs. Hixenbaugh responded:

> That was my understanding. Your fee agreement says et cetera. We tried to get you to explain what et cetera means. You never would. You would get mad. You never would explain what et cetera means.

(Tr. 64).

Mrs. Hixenbaugh also testified that she had spent several hours working in Mr. Affeldt's office, and that she desired to remain active as a class representative. She estimated that she could contribute approximately $10,000 to defray further costs of litigation.

The second of the named plaintiffs to testify was Rebecca Welch Weitzman. She went to see Mr. Affeldt in July, 1980, at which time he accepted her case. In response to her inquiry about costs, Mr. Affeldt told her that the most that it would be would be for the cost of her deposition, which would be a "few hundred" dollars.

With reference to the question of whether to file an individual or a class action, Mrs. Weitzman testified that she had expressed concern to Mr. Affeldt that filing a

class action might jeopardize her continued employment with the defendant. We assured her that he could obtain a court order to keep her position. In addition, he took the position that a class action would be preferable because a class action could "save court time." As with Mrs. Hixenbaugh, Mrs. Weitzman signed her fee agreement a few days before her deposition was taken. In addition, she paid for the costs of her deposition, and shared the costs of the depositions which were taken of Owens-Corning officials.

Mrs. Weitzman testified, with reference to the confrontation which she had had with Mr. Affeldt on February 14, 1981, a few days before the date on which the depositions of the named plaintiffs were to take place, that she had sought an explanation of costs, and that she had been told to get out of Mr. Affeldt's office. Thereafter she returned to Mr. Affeldt because, according to her testimony, she had no other alternative if she wanted to pursue the litigation.

When, on cross-examination by Mr. Affeldt, Mrs. Weitzman was asked about her understanding of the meaning of the term "costs," the following colloquy ensued:

Q. Correct me, [Mrs. Weitzman]. I'm still confused. When you signed the fee agreement, you were fuzzy and vague about what costs were, correct?

A. You told me the cost was for my deposition. I was trying to ask you when I signed it how much it would be.

Q. Just answer yes or no. Were you vague at that time about that? That's all.

A. How much the cost was, yes.

Q. Were you vague about the fact that costs included more than depositions?

A. Not at that time. I still thought it was depositions.

Q. At that time you didn't know who was going to pay the cost in this case?

A. I didn't really know what other costs would have been involved.

Q. But other costs, you eventually became informed, were involved, weren't you, [Mrs. Weitzman]?

A. You would tell us there are other things we were suppose[d] to pay.

Q. Like Dr. Klein?

A. Finally at the end of December of 1982 is when we had talked about going to another attorney to try to find out what "costs" really were and what we were legally suppose[d] to be paying, whether it be now or later.

Q. Do you know what costs are?

A. I still don't know, no.

(Tr. 258-9)

Mrs. Weitzman testified that at her suggestion a "second front" against Owens-Corning was opened up in Washington. In addition, she indicated that she had spent considerable time at Mr. Affeldt's office working without compensation. She testified that she has substantial resources available to enable her to bear the costs of her further participation in this litigation. She desires to remain as a class representative.

Mr. Affeldt's cross-examination of Mrs. Hixenbaugh and Mrs. Weitzman elicited acknowledgements from both that their testimony during their depositions may not have

been truthful. When asked by Mr. Affeldt whether she had lied in the deposition under oath, Mrs. Hixenbaugh responded, "Because you told me to lie." And, when thereupon asked, "Did you lie under oath?" Mrs. Hixenbaugh repeated, "Because you told me to lie." (Tr. 155).

During the cross-examination of Mrs. Weitzman by Mr. Affeldt, the following colloquy occurred:

Q. I'll ask you this question [Mrs. Weitzman]. Are you going to testify like [Mrs. Hixenbaugh] that you lied because your lawyer told you to lie; is that your point?

A. Yes, sir.

Q. Would you lie if Mr. Gorman told you to lie?

A. If my attorney advised me to, I guess I would, yes.

Q. Did your attorney tell you to lie in any other part of the deposition, [Mrs. Weitzman]?

A. Yes.

Q. So, therefore, your testimony is a pack of lies, [Mrs. Weitzman]?

A. That's not true.

(Tr. 256-7)

Although I *sua sponte* struck the last question and response from the record, expressing at that time my concerns about the effect of this line of inquiry upon the class, it is clear from the preceding questions and answers that Mrs. Weitzman's credibility has been significantly jeopardized by the answers elicited by Mr. Affeldt. The same is true with reference to the questions asked by Mr. Affeldt of Mrs. Hixenbaugh.

The third named plaintiff, Dorothy Sharp Anderson, testified that she was informed by Mr. Affeldt's paralegal, Ms. Lynn Zola, that she would have to pay for only the cost of her deposition and her attorney fees. Upon that understanding, she signed a fee agreement on July 1, 1980, during her first visit to Mr. Affeldt's office. She also testified that, if asked questions similar to those asked Mrs. Hixenbaugh and Mrs. Weitzman, her answers would be substantially the same.

Although questions were not raised during Mrs. Anderson's testimony about her credibility, it is apparent that she has substantially fewer resources which she could commit to maintaining this action. When requested to estimate the figure which she reasonably and realistically believes would be available to her, Mrs. Anderson said, "a few thousand." She responded affirmatively to an estimate of "two, three thousand dollars approximately." (Tr. 324). Simultaneously, she, along with Mrs. Hixenbaugh and Mrs. Weitzman, has become liable for the costs and fees which will be incurred as a result of her being called upon to defend the action brought by Mr. Affeldt against her and the other named plaintiffs. It is apparent that defense of that lawsuit, which will include maintenance of a counterclaim, will impose significant demands upon not only the resources but the time and attention of the named plaintiffs as well.

Several witnesses were called by Mr. Affeldt in support of his motions. The first was Mrs. Jane M. Kyser, a black employee of the defendant Owens-Corning Fiberglas. She testified that she desires to be named as a representative of the class, she has signed a $5,000 promissory

note to Mr. Affeldt as security for reimbursement of future costs, and she has sufficient assets to meet such future expenses. She has attended some meetings with the current named plaintiffs. In addition, she has done some work at Mr. Affeldt's office with reference to the litigation.

The second witness called by Mr. Affeldt was Grace Kyser Bilgili, Mrs. Kyser's daughter. She testified that she has been an unsuccessful applicant for employment at Owens-Corning Fiberglas on several occasions in the past, and that she desires to be named as a class representative. She would rely upon her parents to contribute her share of expenditures. She also has signed a promissory note as security for such expenditures.

The third witness called by Mr. Affeldt was Ruth Stone, who is a named plaintiff in one of the suits which has been consolidated with the actions brought by the named plaintiffs. She has also signed a promissory note for security for reimbursement of costs. She has given $500 to Mr. Affeldt and spent some time at his office on matters related to this litigation.

The fourth witness called by Mr. Affeldt was John Affeldt (his nephew employed in his office), who testified about events following the confrontation between Mrs. Weitzman and Mr. Affeldt on February 14, 1981. After that session, John Affeldt testified, there was a further meeting to discuss costs and reimbursement on May 5, 1981. The next meeting on that topic was in May, 1982, followed by meetings on August 3, 1982, and September 19, 1982.

Thereafter, the October 5, 1982, memorandum and installment payment demand was prepared and sent by John Affeldt to the named plaintiffs. He testified that copies of bills for depositions, expert's fees, and co-counsel's fees have been given to the plaintiffs.

The last witness called by Mr. Affeldt was his paralegal, Ms. Lynn Zola. She likewise testified about events occurring at the February 14, 1981, meeting and thereafter. To a considerable extent, her testimony was similar to that of John Affeldt. She provided greater detail, however, about the work performed by the named plaintiffs at Mr. Affeldt's office, and the fact that that work was solicited in an effort to keep the costs of the litigation down.

Miss Zola reviewed several bills which, according to her testimony, had been shown to the named plaintiffs at various times. In her opinion, the plaintiffs were unwilling to work or send in payments, though they knew that costs were being incurred.

No notice was given to this court by Mr. Affeldt of the existence of the disputes relating to costs and their reimbursement prior to the filing by him of the motions which led to this Report and Recommendation. Those motions were filed approximately thirty months after the confrontation with Mrs. Weitzman.

B.

Factual Findings

In light of the foregoing testimony and the exhibits admitted into evidence at the evidentiary hearing, I make the following factual findings:

1. Prior to the time at which each of the named plaintiffs undertook to serve as a class representative, Mr. Affeldt had not informed her of the costs for which she would become liable. He did not explain the meaning of the term, "costs," provide examples of the kinds of expenses which reasonably could be expected to arise, or give an estimate of the range of expense which might reasonably be expected to be incurred.

2. As a result of Mr. Affeldt's failure to inform the named plaintiffs about the type and amount of costs which reasonably could be expected to be paid, there was no knowing and intelligent assent given by the named plaintiffs to serve as class representatives.

3. Also as a result of said failure, disputes arose regarding the obligations owed by the named plaintiffs as class representatives, and those disputes have remained unresolved until the present time.

4. Requests made by the named plaintiffs for itemization verification of costs which had been incurred were reasonable.

5. Mr. Affeldt failed to respond adequately to the named plaintiffs' requests for itemization and verification; as a result, there was a mutual loss of confidence between the named plaintiffs and Mr. Affeldt.

6. Mr. Affeldt failed to call this court's attention to the existence of the disputes between himself, as class counsel, and the named plaintiffs in a timely and adequate manner; as a result of such failure, the breach between himself and the named plaintiffs became irreparable.

7. The interests of the absent class members in prompt adjudication of the class certification motion and a harmonious and effective relationship

between their representatives and their attorney have been substantially prejudiced by Mr. Affeldt's failure to a) obtain knowing and intelligent assent from the named plaintiffs when they decided to act on behalf of the class, b) respond adequately to the disputes which arose between himself and the named plaintiffs, and c) promptly notify the court about the existence of such disputes.

8. The acknowledgment by the named plaintiffs Hixenbaugh and Weitzman that they had not testified truthfully during the course of their depositions would, during further proceedings in this cause, subject them to impeachment and the dimunition of their credibility thereby jeopardizing the interests of the plaintiff class.

9. The named plaintiff Anderson does not have sufficient resources with which to meet the anticipated further costs of this action while simultaneously defending the action brought by Mr. Affeldt in the Lucas County Court of Common Pleas.

10. The ability of all three named plaintiffs to work effectively on behalf of the class would be substantially jeopardized as a result of the demands which will in all likelihood be made upon their attention, time, and resources by the litigation brought against them by Mr. Affeldt.

II.

Discussion

My findings of fact relating to the failure to obtain knowing and intelligent assent and to respond adequately to the named plaintiffs' requests for itemization and verification incorporate implicitly the additional finding that

their testimony on these matters was credible. This finding on their credibility is based on four considerations.

The first consideration is the demeanor and manner of testifying on the part of each of the named plaintiffs. Even standing alone, without consideration of other factors which support their credibility, their testimony about the course of their relationship with Mr. Affeldt from its inception to the present was persuasive.

A second consideration is that no evidence was introduced by Mr. Affeldt to contradict the plaintiffs' testimony about their initial discussions and understandings. Neither Ms. Kendrick nor Ms. Zola testified about their discussion of costs with the named plaintiffs, though Ms. Zola was called to testify about other aspects of the disput between Mr. Affeldt and the named plaintiffs.

A third consideration is the language of the letter written by Mr. Affeldt to the three named plaintiffs on December 28, 1982, which indicates that on September 29, 1982, the plaintiffs were advised of the necessity of bearing and sharing the costs of litigation. That reference suggests quite strongly that prior to that time the plaintiffs had not been informed of the nature and scope of their responsibility for costs. This indication is further supported by the reference in the letter to the plaintiffs' obligation "for all costs and expenses even those which had to be advanced," and the statement that at the present time there was no agreement for payment of costs.

Each of these statements by Mr. Affeldt to the named plaintiffs strongly supports their contention that, at the time they agreed to act as class representatives, rather than in an individual capacity, they had not been informed

about the financial responsibility which they were assuming with such decision. When that letter was written, this litigation had been pending for more than two years. Disputes about reimbursement had existed for nearly eighteen months. Yet, it is clear that as of the end of December, 1982, there was no clear understanding on the part of the named plaintiffs about their financial obligations as class representatives.

The final consideration is Mr. Affeldt's astonishing assertion that an attorney who undertakes a class action has no duty to enlighten the named plaintiffs about their obligation for costs as class representatives (Partial Tr. 16-18). Not only does Mr. Affeldt not dispute the named plaintiffs' description of their initial conversations and understanding, he affirmatively asserts that he had no duty to inform them about the nature of their undertaking.

Mr. Affeldt's argument in his post-hearing brief that the named plaintiffs had "full and complete understanding" from the outset about the nature of costs is supported by neither the record of the hearing nor the deposition excerpts quoted in that brief (RJA 9/25/83 Brief, 13-23). The named plaintiffs' testimony at their depositions was, particularly when contrasted with their testimony at the evidentiary hearing, evasive, unilluminating, and, in light of their responses upon cross-examination at the evidentiary hearing, apparently inaccurate. Far greater credence should be given, in my opinion, to the detailed and extensive testimony of the named plaintiffs at the evidentiary hearing.

In light of these considerations and the finding that Mr. Affeldt failed to obtain knowing and intelligent as-

sent from the plaintiff to serve in a representative capacity, this court must consider the requirement of Rule 23 (a)(4) that the representative and counsel be shown to be adequate. As Mr. Affeldt points out in his memorandum of September 26, 1983, "class representatives have a high fiduciary obligation to class members. Any default constitutes not only a private, and a quasi-public, but a public wrong—a wrong to the individual class members, the class itself, and the public interest." (RJA 9/26/83 Brief at 5). That fiduciary obligation is not, however, one which the named class representatives bear alone; rather, it is an obligation shared jointly with the attorney who acts as their representative, and through them, as the representative of the class on whose behalf they are acting and seeking relief. The attorney's fiduciary obligation is, therefore, no less than, and indeed, in light of his professional standing, expertise, and role, it must be deemed to be greater than the "high fiduciary obligation" imposed under Rule 23(a)(4) upon the named class representatives.

Before assuming the obligations flowing from an election to act on behalf of a class of similarly situated individuals, rather than simply on her own behalf, a plaintiff must be able to make that decision fully cognizant of its consequences, both for herself and for the class as a whole. In a word, she must know, to the maximum feasible extent, what she is getting into.

The lawyer whose advice, consultation, and representation she has sought is the primary, if not the sole source of information about the significance and consequences of those obligations. If the lawyer is to perform his duty to the plaintiff, both individually and as a prospective class

representative, he must give her a clear, concise, and comprehensive indication of the scope, effect, and demands of service as a class representative. Otherwise, there is great danger that the individual client will agree thoughtlessly and ignorantly to pursue a class, rather than an individual action.

One would have thought that the foregoing propositions were self-evident. In light of Mr. Affeldt's contention that he had no obligation to enlighten the named plaintiffs about the financial consequences of their decision to act on behalf of a class, certain provisions of the Code of Professional Responsibility should be called to the parties' attention. Ethical Consideration 7-8 states expressly, "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so." Though at present its standards are of solely exhortatory effect, Rule 1.4 of the recently enacted A.B.A. Rules of Professional Conduct is even more explicit:

> Rule 1.4 Communication
>
> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer *shall* explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. (Emphasis supplied.)

The Comment to this Rule elaborates upon this obligation:

> The client should have sufficient information to participate intelligently in decisions concerning the

> objectives of the representation and the means by which they are to be pursued, to the extent that the client is willing and able to do so . . . .
>
> Adequacy of communication depends in part on the kind of advice or assistance involved . . . . In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others . . . . The guiding principle is that the lawyer should fulfill reasonable client expectations consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

A.B.A. Model Rules for Professional Conduct, Rule 1.4 (52 U.S.L.W. 1, 5 (Aug. 16, 1983)).

It is clear byond any doubt from the testimony at the evidentiary hearing and Mr. Affeldt's expressly stated assertion that he had no duty to enlighten the named plaintiffs that Mr. Affeldt failed to make certain that the named plaintiffs were adequately informed and fully cognizant of their obligations at the time that they chose to pursue a class, rather than an individual remedy. Mr. Affeldt's description of the solemn obligation assumed by a class representative is accurate; he omits and disregards, however, the equally solemn responsibility of the lawyer to make certain that the named plaintiff does not assume that burden either casually or unaware of the responsibility she is assuming.

The only conclusion which can be reached from the record in this matter is that the named plaintiffs were not adequately informed about the financial consequences of their decision to act as class representatives. Each testified, and I give credence to such testimony, that she was

only told that she would be obligated for the costs of her own deposition. This is not, as Mr. Affeldt's own briefs point out, an accurate or complete statement of the law about the financial obligations of a class representative. It is, however, and I find expressly that such was the case, the sum and substance of the information given to these named plaintiffs at the outset of their attorney-client relationship with Mr. Affeldt about their financial commitment as class representatives.

By failing to fulfill his duty at the outset of his relationship with the named plaintiffs, Mr. Affeldt assumed the risk that difficulties would develop as the case progressed and costs were incurred. Those risks were heightened by his conduct during the ensuing two and a half years. This is particularly true with respect to his failure to respond to reasonable and proper requests for itemized verification of the amounts which had been spent.

Had this failure not occurred, there is no guarantee that the original failure to obtain a knowing and intelligent assent to performing the class representative role would not have led to difficulties in any event. As a result of the failure to inform the named plaintiffs in reasonable detail about the potential expenditures, it was not possible for Mr. Affeldt to be certain that they would, in fact, be able to bear the costs of the class action. Such certainty is, of course, a crucial component of any decision by an attorney to proceed on behalf of a class, rather than simply to pursue an individual remedy. As long as Mr. Affeldt had failed to satisfy himself that the named plaintiffs could absorb the reasonable costs of financing the litigation, there was a continuing risk that he would be unable to re-

coup amounts which had been invested on behalf of the class. If either recoupment or further funding became impossible, the class action would have to be abandoned *in medias res*. In this case, the fate of the class action was necessarily in doubt and potential jeopardy from the outset. Though perhaps not doomed to collapse, the class action was substantially weakened by the initial failure to make certain that the costs of litigation could be underwritten.

The jeopardy increased as the named plaintiffs and the attorney drifted further apart on the issue of reimbursement for costs. Consultation on that issue was sporadic and often stormy. Reasonable requests for itemized and verified statements of expenses were not honored. Rather, they were disregarded, or, at best, handled in a haphazard and unsatisfactory manner, with the result that mutual suspicion and dissatisfaction increasingly tainted the attorney-client relationship.

To a reasonably attentive attorney, the storm signals should have been readily apparent, and a corrective course promptly pursued. But those signals were not heeded, no responsive action was undertaken, and the jeopardy to the interests of the absent class members increased accordingly.

The issue here is not, as asserted by Mr. Affeldt, the inability of the named plaintiffs to pay the reasonable and necessary costs of the litigation. The issue, rather, is his failure to be responsive to their concern about costs which they viewed as inadequately explained and justified. Even where those costs are entirely appropriate and necessary to further the interests of the class, the lawyer cannot disregard reasonable demands by the named plaintiffs for

professionally submitted statements of account. All clients are entitled to professional treatment. This especially is true in a class action, where the interests of the individual plaintiffs may sometimes coincide and sometimes conflict with the interests of the class. This imposes a higher duty of vigilance on the class attorney, and a greater duty of ensuring that the class interests are being served by all concerned.

In this case the steadily deteriorating relationship has threatened prejudice to the class and its interests. A general consequence has been that disharmony has disrupted the attorney-class representative relationship for more than two years. It is reasonable to conclude that this litigation has proceeded less efficiently and effectively on behalf of the class as a result of this situation. More directly important work on statistical evidence has been delayed, if not rendered entirely unattainable, as a result of the failure to compensate the expert. In addition, considerable delay has impeded this court's efforts to determine the class certification motions and other matters.

These intangible and tangible adverse impacts upon the class and its interests are the direct consequence of the stalemate between Mr. Affeldt and the named plaintiffs. That stalemate is, in turn, the proximate result of the failure to have described the obligation which was being undertaken, the lack of knowing and intelligent assent to pursue the class remedy, the refusal to respond in a timely and effective manner to reasonable requests for information and prior consultation, and the prolonged delay in bringing these problems to the court's attention. Though the named plaintiffs may not be without fault in this

debacle, the failures of Mr. Affeldt in this respect contributed far more directly and substantially to the present impasse and open warfare between himself and the named plaintiffs.

Without question, an individual named plaintiff cannot veto each and every tactical decision made by the attorney, and no such veto was sought by the named plaintiffs in this case. Nor can the lawyer allow the individual interests of the named plaintiffs to conflict with their obligations as class representatives. But these principles, upon which Mr. Affeldt relies, are not irredeemably inconsistent with practices of informed consultation and knowing assent which were not followed by the lawyer in this case. Instances of tension and potential conflict are an inherent aspect of class action proceedings. It is incumbent upon the lawyer to make certain that tension is averted and conflict avoided. This can occur only where the lines of communication are kept open, and the lawyer is alert and responsive to the needs and demands of the named plaintiffs. Every effort must be made to respond to those needs and demands without jeopardizing the interests of the class, or preferring the named plaintiffs over their absent constituents.

The inadequacy which marred the attorney-client relationship at its inception and which led to its ultimate collapse were compounded by Mr. Affeldt's failure to notify the Court promptly about the conflict between him and the named plaintiffs. In his September 26, 1983 post-hearing brief, Mr. Affeldt writes:

> The courts have recognized that the Court must act as a "guardian" for the interests of absent class

> members. If there is the slightest doubt or suspicion that a class representative cannot adequately finance the class action, "it should revoke class certification."

(RJA 9/26/83 Brief at 11) (citations omitted).

Certainly there can be no quarrel with Mr. Affeldt's portrayal of the court's role in ensuring that the interests of the absent class members are not jeopardized by the conduct of the named plaintiffs or of counsel during the progress of the litigation. Nor can exception be taken to Mr. Affeldt's additional statement that, "If a conflict of interest exists between the class representative and the class, the class attorney has the duty to speak out to the court." (Id. at 12-13).

Mr. Affeldt's next sentence—"This is precisely what happened in this case"—is, however, simply not accurate. Since the pre-deposition meeting on February 14, 1981, at the latest, it was apparent that substantial problems existed between Mr. Affeldt and the named plaintiffs. But no action was taken by him to inform the court, and no notice was given until thirty months later, when Mr. Affeldt undertook to perform his "duty to speak out to the court" by filing the pending motions in this action and suing the three named plaintiffs in the Common Pleas Court. Until the evidentiary hearing, convened *sua sponte* by the undersigned, this Court was unaware of the nature of the dispute or its origin and history.

I am no less concerned about Mr. Affeldt's delay in calling this Court's attention to the breach between himself and the named plaintiffs than I am about his failure

to have secured informed assent to the maintenance of this class action and the neglectful and unsatisfactory attitude he displayed towards the named plaintiffs and their requests for information and to be consulted prior to the investment of funds which they were to be called upon to expend. Most simply put, had these problems been called to this court's attention at a considerably earlier date, appropriate steps could and would have been undertaken to resolve the conflict. In addition, at that time this court could have ascertained the willingness and ability of the named plaintiffs to pay the costs of this litigation.

The delay in calling this matter to this court's attention substantially diminishes the options which it has available to it. At the present time, the relationship between the named plaintiffs and Mr. Affeldt is, to put the matter politely, in a shambles. Their disagreements, for which Mr. Affeldt must bear the major blame, have escalated into a total and permanent breach. In light of the protracted period during which he allowed this situation to fester, Mr. Affeldt failed to comply with his obligation to the class members, as well as to the named plaintiffs, to call the Court's attention to the problems and to seek the Court's assistance in a timely and effective manner. Because he did not do so, this Court must at a very late stage in this litigation, seek to jury-rig a resolution which takes adequate cognizance of the interests of the absent class members. Earlier action on Mr. Affeldt's part, and a greater sensitivity to his obligations to the class would have reduced the difficulties confronting the Court at the present time, and diminished significantly the risk of prejudice which presently exists vis-a-vis the class as a whole.

III.

Conclusions of Law

In light of the foregoing, I conclude, as a matter of law, that

1. Because Mr. Affeldt failed to represent either the three named plaintiffs or the interests of the class adequately, he is not an adequate representative of the class.

2. Mrs. Hixenbaugh and Mrs. Weitzman, in light of their testimony and the likelihood that they would be subject to impeachment during the course of further proceedings in this cause, are no longer adequate representatives of the class.

3. Mrs. Anderson, because she does not have the financial ability to meet the further costs of this litigation, is no longer an adequate representative of the class.

4. The effect upon the three named plaintiffs of the demands arising from the litigation between them and Mr. Affeldt will be to prevent them from adequate future service as class representatives.

5. In light of the foregoing findings of fact and conclusions of law, I conclude further that Mr. Affeldt and the three named plaintiffs should be disqualified from further participation as representatives in this proceeding.

IV.

Remedy

At the outset of this Report and Recommendation, I noted that I had been unable to uncover any case substantially on point which could provide guidance to this court as it attempts to deal with the problems which have arisen in this case. A handful of cases do, however, state some general principles which appear to be applicable. In *Wofford v. Safeway Stores*, 78 F.R.D. 460, 486 (N.D. Cal. 1978), for example, the court stated, with reference to the Rule 23(a)(4) adequacy determination, "Courts may take into account any prior failure to proceed in the best interests of the putative class in this litigation, as well as counsel's general qualifications." And, in a related context, in which questions were being asked about plaintiff's counsel's compliance with ethical strictures against solicitations the court stated:

> In assessing the ability of plaintiff's counsel to carry out his fiduciary duties to absent class members we think the court should use its "broad administrative, as well as adjudicative power" as "guardian of the rights of the absentees" to see that the absentees are represented by counsel who is ethically as well as intellectually competent to represent them.

Stavrides v. Mellon National Bank & Trust Co., 60 F.R.D. 634, 637 (W.D. Pa. 1973) (footnotes omitted).

In another case dealing with a challenge to the plaintiffs' attorney's compliance with the Code of Professional Responsibility, *Brame v. Ray Bills Finance Corp.*, 85 F.R.D. 568, 577 (N.D. N.Y. 1979), the court noted that such

noncompliance, even if established, would not automatically require or justify withholding class certification:

> This court believes that the ethical competence of attorneys desiring to represent a class is relevant to the question of adequacy of representation, but that not all breaches of the Code of Professional Responsibility will necessarily require the denial of class action status. The seriousness of the particular breach and the possibility of prejudice to the class will have to be evaluated.

The court also noted that substitution with ethically competent counsel in place of those who have been found wanting could protect the interest of the class in obtaining certification, provided the other criteria of Rule 23 have been satisfied. *Id.* at 577 n.4.

This observation provides a suggested remedy, which I recommend be adopted by this Court: namely, that, upon determining that both Mr. Affeldt and the named plaintiffs would not be adequate representatives, this court conditionally grant the motion of Mrs. Kyser and Mrs. Bilgili for leave to be substituted as named plaintiffs. Such leave would, however, be conditioned upon their obtaining independent counsel,* who would undertake to represent them

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* I recommend that the court make no determination at the present time about whether William Moore, Esq., who has previously filed his notice of appearance as co-counsel with Mr. Affeldt, could or should be considered to be sufficiently "independent" to satisfy that aspect of my recommendation that Mrs. Kyser and Ms. Bilgili be conditionally certified as class representatives upon their obtaining independent counsel. I have serious doubts that Mr. Moore could or would be viewed as being independent of Mr. Affeldt for several

(Continued on following page)

and the remaining named plaintiff, Mrs. Stone, as representatives of the putative class.

In this manner, the adverse consequences to the class from Mr. Affeldt's unsatisfactory conduct can be reduced without simply denying all opportunity for class certification on the basis of the inadequacy of counsel. Given the total deterioration of the relationship between Mr. Affeldt and the named plaintiffs, and the role played by Mr. Affeldt in causing such deterioration to occur, his further participation as counsel to the class is unthinkable. His conduct had led to serious question about the continued viability of this case as a class action, and it has otherwise placed the interests of the absent class members at serious risk.

On the other hand, to proceed directly to abandon all further consideration of certification of a class would be to sound a death knell for the rights of the absent class members. This hardly seems fair or appropriate, particularly in light of the fact that this matter has proceeded to

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reasons. His mode of practice suggests that he and Mr. Affeldt have some association: even if they do not, there is the clear appearance of such association or affiliation. The record indicates that Mr. Moore attended one or more of the conferences relating to costs between other representatives of Mr. Affeldt's office and the named plaintiffs. In his December 28, 1982, letter to the named plaintiffs, Mr. Affeldt clearly contemplated using Mr. Moore as counsel in any collection efforts. In light of the foregoing, and the serious and substantial nature of Mr. Affeldt's failure to serve the interests of either the named plaintiffs or the class, I doubt Mr. Moore's independence in this cause. However, I do not wish to foreclose all opportunity for further inquiry on that issue, if he and the conditional class representatives wish to pursue the matter.

the threshold of a decision on the merits of the class certification motion. To terminate consideration of those merits would mean that the time, effort, and money expended by the parties to date in that inquiry would be irredeemably wasted and lost.

This court, therefore, must pursue a middle course whose lodestar is the interest of the absent class members in obtaining a determination on the merits of a) the class certificatioon motion, and b) if a class is certified, the merits of the class action complaint against the defendant. That can occur, in my opinion, only if Mrs. Kyser and Mrs. Bilgili can join Mrs. Stone as named plaintiffs, and new and independent counsel is obtained so that this matter can proceed to an appropriate conclusion.

The recommendation that two new class representatives be conditionally certified contemplates that the defendant will be able to inquire further regarding their adequacy before a final determination is reached on the class certification issue.

With reference to the status of Mrs. Stone as a class representative, it continues to be my understanding that she has not been formally designated as such. See Memorandum and Order dated March 4, 1983. If such is the case, she can continue to pursue an individual remedy, but not a class remedy, with Mr. Affeldt as her attorney. Mrs. Kyser and Ms. Bilgili can, of course, do likewise. If, however, any one of these three plaintiffs desires to pursue a class remedy, then they should be permitted to do so only if they secure independent counsel. Absent the appearance of independent counsel on their behalf within the time period prescribed by the court, then an order should be entered

denying the class certification motion on the basis that Mr. Affeldt has failed to establish that he is an adequate representative of the class, and no other attorney has been obtained* who will undertake to represent the putative class.

In addition, if my Report and Recommendation are adopted, the order of disqualification should require Mr. Affeldt to make his files and work product available to Mr. Gorman and, if Mrs. Stone, Mrs. Kyser, and Ms. Bilgili pursue a class remedy, to successor counsel without requiring prior reimbursement of the costs incurred by him in preparing those materials on behalf of the class. His interest in reimbursement is adequately protected, in my opinion, by the lien which he would have in the event that the plaintiffs prevail, either individually or as a class. At that time the court can direct compensation for both fees and costs for Mr. Affeldt.

In addition, Mr. Affeldt's pending lawsuit against the named plaintiffs seeks reimbursement for these items. His expectation of recovery in that litigation provides further protection to him.

When these considerations are balanced against the interest of the named plaintiffs, the successor class plaintiffs, and the absent class members in a prompt resolution of their claims against the defendant, then it appears appropriate to direct the delivery without delay of the files and materials which have been prepared to date in this

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* If the conditionally certified class members desire, they may examine the court's roster of attorneys who have expressed a willingness to accept assignments in employment discrimination cases.

litigation. I recommend, therefore, that this Court order such production if it adopts the balance of this Report and Recommendation.

Conclusion

On more than one occasion in this Report and Recommendation I have commented on the difficult problems raised by Mr. Affeldt's pending motions. I am also aware of the significant impact upon his expectations and those of the named class members if the solution which I propose is adopted by the Court. Most importantly, I am cognizant of the Court's duty to act as guardian of the interests of the class. When basic facts are not disputed, and when the interest of the class have, as in this case, been placed in jeopardy, responsive action by the Court must be prompt and effective, even if the result is to reach an outcome which had not been anticipated by those who, until now, have considered themselves to be acting on behalf of the class. Given the course of conduct in this case, this Court can meet its duty to the class only by acting without hesitation to respond to a situation which calls for prompt and effective relief.

Upon extensive consideration of all the issues and interests, I am persuaded that the approach which I propose herein best promotes and protects the interests of the absent class members, and that that approach should be followed if the interests of the class are to proceed to adjudication without further undue delay.

In making my recommendations, I wish to make clear that the precedent set by this decision in this case is a limited and narrow one. It should not be viewed by coun-

sel in other class actions, whether brought by Mr. Affeldt or other attorneys, as an Open Sesame into the arrangements between class counsel and class representatives. Under normal circumstances defense counsel can make only a limited inquiry about those arrangements. Such limitation is appropriate as long as problems between class counsel and class representatives have not arisen and become apparent. The risks which Mr. Affeldt ran when he failed to secure knowing and intelligent assent, and when he failed to respond adequately to the named plaintiffs' requests did not, in my opinion, *per se* subject him to a finding that he would be an inadequate class representative. Had agreement thereafter been reached, and had the mutual duties of counsel and clients been acknowledged and performed, then there would have been neither occasion nor need for inquiry and intervention. These are, in the first instance, matters of primary concern between the attorney and the named representatives, and the lawyer will be presumed to have performed properly until some action occurs which raises questions about the accuracy and validity of that presumption.

Such occurred, unfortunately, in this case, and that, in turn, led to the unusual course which this case has taken, culminating in my recommendation that both class counsel and the named representatives be disqualified, for the reasons stated, from further representation of the class.

It is, therefore,

RECOMMENDED that

1. The motion of Robert J. Affeldt to remove the plaintiffs Hixenbaugh, Weitzman, and Anderson as class representatives be, for the reasons stated herein, granted;

2. The motion of Robert J. Affeldt for leave to withdraw as counsel to the named plaintiffs be granted;

3. Robert J. Affeldt, Esq., be, for the reasons stated herein, disqualified as counsel for the class(es) sought to be certified in this cause; and that Mr. Affeldt be directed by this court to make available to counsel for the named and successor plaintiffs all files, documents, and other materials developed, prepared, and obtained by him during the course of his representation of the named plaintiffs, the successor plaintiffs, and the class(es) sought to be certified in this cause; said production to be without advance payment of cost or reimbursement to Mr. Affeldt, and subject only to his lien for fees and costs, to be paid following entry of judgment in favor of one or more of the plaintiffs;

4. The motion of Robert J. Affeldt to designate Jane M. Kyser and Grace Kyser Bilgili as representatives of the class(es) sought to be certified herein, be granted upon the condition that, within four weeks of the date on which this Court adopts this Report and Recommendation independent counsel have filed an appearance on behalf of Mrs. Kyser, Ms. Bilgili, and Mrs. Ruth Stone;

5. In the event of a failure of an appearance by independent counsel on behalf of Mrs. Kyser, Ms. Bilgili, and Mrs. Stone, an order be entered denying the motion to certify the class(es) herein, and that this cause continue as individual actions by each of the named plaintiffs, with counsel of her choosing.

/s/ James G. Carr
United States Magistrate

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Dorothy Sharp, et al.,

Plaintiffs

vs.

Owens-Corning Fiberglas,

Defendant

C 80-450
Magistrate's Report
and
Recommendation

(Filed Aug. 2, 1984)

This is an employment discrimination case which has been referred to the undersigned for initial hearing and determination of pretrial matters. Pending for decision is a motion by the defendant which seeks a determination that the named plaintiffs, who were conditionally certified as class representatives in an Order entered on March 8, 1984, be held to have failed to satisfy the terms and conditions of said Order, because they have not obtained successor class counsel independent of disqualified class counsel, Robert J. Affeldt, Esq. If such determination is made, then, as prescribed in the March 8, 1984, Order, the Court, if it abides by said Order, will enter an Order denying the pending class certification motion.

Upon a review of the memoranda submitted by the parties with reference to the defendant's pending motion challenging the independence of successor counsel (Messrs. Joseph Westmeyer, Esq. and Mark Robinson, Esq.), I conclude that the named plaintiffs have failed to comply with the March 8, 1984 Order, in that successor counsel is not

independent in the sense in which that term was used in the Order. I also conclude, though not entirely without reservation, that this Court should, in the light of the failure of the named plaintiffs to have complied with that Order, deny the motion for class certification.

I.

Background

Though the Court is no doubt familiar with the history of this litigation as it relates to the disqualification of former class counsel, Mr. Affeldt, and the directive that the named plaintiffs were to obtain counsel independent of Mr. Affeldt, if they desired to obtain class certification, a brief summary of that history may be useful to set the instant motion into context. This summary does not supplant or alter the findings, conclusions, or recommendations contained in my Report and Recommendation of October 20, 1983, which may be consulted for further details about this aspect of this lawsuit.

In that Report, I found, in part, that Mr. Affeldt had failed to fulfill his obligation to the class members to represent their interests adequately. That finding was, in turn, based upon the determination that Mr. Affeldt had: insufficiently informed the then named plaintiffs of their obligations regarding costs and expenses; communicated inadequately with those persons regarding amounts being expended and costs being incurred during the course of this litigation; and neglected to inform the court about crucial disputes and disagreements in a prompt and appropriate manner. For the reasons expressed in the Octo-

ber 20, 1983 Report, I concluded that Mr. Affeldt should be disqualified from further representation of the class.

Given the serious nature of Mr. Affeldt's mishandling of his responsibilities to the class and the jeopardy to the class and its interests which resulted, I deliberately and specifically recommended to this Court that it allow this matter to continue further as a class action only if the named plaintiffs (two of the three of whom first entered the case in such capacity at the hearing leading to the October 20, 1983, Report) obtained independent successor class counsel within four weeks of the date of adoption by the Court of my Report and Recommendation. In view of the fact that no Order adopting the Report was entered until more than five months later, the named plaintiffs had more than six months within which to fulfill their obligation under the Order. For that period of time they were on notice of the possibility that Mr. Affeldt might be disqualified.

II.

The Need for Independent Counsel

My Report and Recommendation of October 20, 1983, was directed primarily to past events, rather than toward future developments. But, in an effort to anticipate and deflect the precise problem which underlies the defendant's instant motion (namely, any effort by Mr. Affeldt to maintain a role, direct or indirect, in this case), I did look ahead when I recommended that successor class counsel be independent of Mr. Affeldt. The purpose of that recommendation, which the Court later incorporated into its March 8, 1984, Order, was to ensure Mr. Affeldt's com-

plete removal from this case, so that it would be clear to the members of the class and the Court that he neither was playing nor could play any role in further proceedings. The term, independence, was used not only in the sense that successor counsel was not to be subject to any direction or control by Mr. Affeldt, but, as well, in the sense that there was to be no connection of any kind whereby the possibility of such control could be engendered.

The reason for this stringent requirement was quite simple: Mr. Affeldt, through his conduct, had endangered the interests of the class. In addition, by having undertaken the drastic, unanticipated and unorthodox step of bringing suit against three of the named class members, he had created an irreparable breach between himself and those representatives (and between himself and the class as a whole, but for the fortuitous circumstance that those individuals had likewise failed to perform as adequate class representatives). In light of that conduct and those actions it was imperative that Mr. Affeldt's separation from this case be absolute and irreversible. To that end, fully and unquestionably independent counsel was a mandated predicate to further consideration of class certification.*

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* It should be noted that, upon the finding of inadequate representation by either the class counsel or the then named plaintiffs, the Court could have properly denied certification. Nothing in Rule 23 compelled it to certify new named plaintiffs conditionally, or to allow them and the one remaining original named plaintiff the opportunity to seek new class counsel.

III.

The Failure to Obtain Independent Counsel

As a result of the Court's adoption of my October 20, 1983, Report and Recommendation, the duty devolved upon the three remaining named plaintiffs to seek out and secure representation by independent counsel. This obligation, which was an express condition of their certification as class representatives, derived, ultimately, from their duty to represent the class adequately. In selecting successor counsel, they were acting not for themselves, but for the class which they had undertaken to represent. The Court's Order of March 8, 1984, simply added the additional requirement that such counsel was to be independent of Mr. Affeldt. Otherwise, they were to obtain competent and adequate counsel if they desired to pursue a class-wide remedy.

The duty of securing counsel rested with the named plaintiffs. It was not Mr. Affeldt's responsibility. He could, of course, provide the named plaintiffs with names of attorneys capable of handling this litigation to its conclusion. But the order of disqualification, having effectuated Mr. Affeldt's removal from this case as class counsel, implicitly prohibited him from selecting successor counsel. To do so would be to act on behalf of the class—which he could not do under the disqualification Order.

Nor could this Court control the named plaintiffs' selection of successor counsel. It could, and in the Report of October 20, 1983, did, inform the named plaintiffs that they could examine the roster maintained by this court of attorneys willing to accept appointments pursuant to 42

U.S.C. § 2000e-5(f)(1) in employment discrimination cases. There is no indication that the named plaintiffs availed themselves of this opportunity.

The record presently before the Court suggests that the named plaintiffs permitted Mr. Affeldt to play a significant role in the selection of successor counsel. From Mr. Westmeyer's deposition it appears that Mr. Affeldt, rather than the named plaintiffs, made the initial contact with Mr. Westmeyer (JW Dep. 55-6), and that either he or Miss Lynn Zola, then a member of Mr. Affeldt's staff, made arrangements for Mr. Westmeyer to meet with the named plaintiffs at Mr. Affeldt's office.

To the extent that Mr. Affeldt played a substantial role in selecting his successor, that action, though improper, would not, standing alone, justify a finding by this Court of noncompliance with the Order of March 8, 1984. If it were otherwise clear that the successor chosen by Mr. Affeldt was independent as required in that Order, then his involvement in the selection process would not defeat the purpose of that requirement.

Such involvement on his part does, however, raise an initial question about the exercise of judgment by the named plaintiffs on behalf of the class. If in making their selection they have simply acquiesced in Mr. Affeldt's decision that Mr. Westmeyer and Mr. Robinson should take over their case, they have created a risk that such counsel might not satisfy this Court's requirement of independence.

In any event, without regard to questions about the process of selection, there are three aspects of the relationship between successor counsel and Mr. Affeldt which

lead to the determination that the requirement of the March 8, 1984, Order to select independent counsel has not been satisfied. The first of these is the fact and nature of the relationship itself; the second is Mr. Westmeyer's status as Mr. Affeldt's attorney of record in state court litigation which touches upon Mr. Affeldt's representation of the class which the named plaintiffs seek to represent; and the third is the prospect of Miss Zola's extensive involvement in this case.

A.

The "Of Counsel" Situation

There can be no question that, following the transfer by Mr. Affeldt of various Title VII class actions to Mr. Westmeyer and Mr. Robinson (of which the instant case was but one), Mr. Affeldt and successor counsel in this case have had continuous and frequent contact regarding, at least, the other cases. The most visible aspect of that relationship has been Mr. Affeldt's appearance "of counsel" in those cases and his attendance and participation at pretrial conferences. In one of those cases there is a written agreement between Mr. Affeldt and Mr. Westmeyer regarding various financial arrangements relating to Mr. Affeldt's prospective claim for fees and costs. It is also apparent that Mr. Westmeyer considers himself to be obligated to preserve Mr. Affeldt's interests in accrued fees in all the cases which have been referred to him by Mr. Affeldt.

Although Mr. Affeldt's anticipated role in the other cases has been variously described as "of counsel" and "consultant," it is apparent from an affidavit filed by

Mr. Affeldt in *Pettaway v. First National Bank*, No. C 82-51 (Afft. 5/10/84), that Mr. Westmeyer and Mr. Affeldt envision possible involvement upon Mr. Affeldt's part, "if called upon," of broad scope, limited only by the restrictions which this court may place upon Mr. Affeldt's direct, in-court activity.

In addition, Mr. Affeldt has provided tutorial service to Messrs. Westmeyer and Robinson, who candidly acknowledge their own lack of substantial experience in either Title VII lawsuits, class actions, or federal court litigation. It is as clear as it is understandable that at the outset of their involvement in Title VII cases, successor counsel have looked to Mr. Affeldt as a principal and primary source of instruction, guidance, and direction.

An extensive and close relationship has, therefore, developed between Mr. Affeldt and successor counsel. That relationship has continued for several months, and there is no reason to doubt that it will continue indefinitely into the future, or at least until such time as the other cases have been terminated.

To be sure, no similar relationship exists with reference to the instant case—nor could it, in light of the Court's March 8, 1984, Order. But that is not the issue under that Order. The issue, rather, is the mandate of independence—*i.e.*, separation—between Mr. Affeldt and successor counsel.

To resolve this issue it is not necessary, as the named plaintiffs argue in their response to the pending motion, for the defendant to show that such control will in fact be exercised by Mr. Affeldt. The burden, rather, is on them to show compliance with the Court's Order that they

obtain independent counsel—that is, counsel who has no connection with Mr. Affeldt. Their implicit contention that they have no burden in that regard reflects a serious misreading of both the Report and Recommendation of October 20, 1983, and the Order of March 8, 1984.

Nor, despite plaintiffs' assertions to the contrary, is the issue one of the First Amendment rights of either Mr. Affeldt, Mr. Robinson, or Mr. Westmeyer. There is no question that the named plaintiffs can retain whomever they choose to represent their individual claims against the defendant. There is, likewise, no question that Mr. Affeldt and Messrs. Westmeyer and Robinson can associate or affiliate in any manner which they deem to be desirable. But their First Amendment interests, to the extent that they exist and are cognizable, simply do not encompass he right to disregard an express mandate that the named plaintiffs must obtain independent counsel if they wish to proceed as class representatives in this litigation. Their First Amendment interests, like their other individual interests generally, are subordinate to their duties to the class, both under Rule 23 and as manifested in the March 8, 1984, Order.

The existence and maintenance of the extensive and continuing relationship between Mr. Affeldt and successor counsel forecloses acceptance of Mr. Westmeyer and Mr. Robinson as independent counsel for the class, as required by the Court's Order. It was incumbent upon the named plaintiffs to make certain that no such relationship existed, and that no question could be raised about the existence of such relationship. It was also incumbent upon all counsel to make certain that the named plaintiffs were

informed about the meaning and scope of the Court's Order, and to ensure compliance with its requirements. That Order was broad and far-reaching, and neither encouraged nor permitted a restrictive interpretation of either its purpose or effect.

Contrary to the purpose and express provisions of the March 8, 1984, Order, the named plaintiffs have failed to obtain counsel who are independent of Mr. Affeldt. However the relationship between Mr. Affeldt and successor counsel may be characterized—be it as one of dependency, control, influence, of counsel, consultant, or otherwise—the only pertinent consideration is that it cannot be described as or found to be one of independence, as used in and required by the March 8, 1984, Order. On this basis alone, without regard to the other concerns expressed in this Report, the Court is compelled to find that its mandate has not been fulfilled.

B.

The Attorney-Client Relationship

A second area in which there is a bona fide question of independence, in the sense in which that term was used in the March 8, 1984, Order, involves the fact that Mr. Westmeyer is currently Mr. Affeldt's attorney in the suit (*Affeldt v. Frye*) which Mr. Affeldt brought against the three former class representatives (who are, at least at this point, still members of the class sought to be represented by Mr. Westmeyer). This attorney-client relationship and some of its possible consequences are a troublesome aspect of this entire matter. So that the record about this relationship could be clear, the parties were

directed to provide supplemental materials reflecting the nature of the litigation brought by Mr. Affeldt, not only against the three former class representatives, but, as well, against a) a former client and another attorney (*Affeldt v. Threet*), and b) a former associate and a former employee in his office (*Affeldt v. Moore*). These last two individuals have, in turn, filed suit against Mr. Affeldt. All of these cases arise out of Mr. Affeldt's work in Title VII cases. According to the court documents and other materials obtained by the parties, Mr. Westmeyer represents Mr. Affeldt in the *Frye*, *Threet*, and *Moore* cases.

In my opinion, only Mr. Westmeyer's status as counsel to Mr. Affeldt in the action brought against the three former class representatives (*Affeldt v. Frye*) is material to the issues raised by the defendant's instant motion. Mr. Westmeyer's representation of Mr. Affeldt in the other matters, particularly if there were no other question about his independence, has nothing to do with the instant case. The named plaintiffs should not be penalized simply because Mr. Affeldt and Mr. Westmeyer have an attorney-client relationship totally outside the confines of the instant case.

But such is not the case: Mr. Westmeyer is counsel of record in litigation which grows out of Mr. Affeldt's role as former class counsel, and in which members of the class sought to be represented by Mr. Westmeyer are defendants. According to the docket and other materials relating to that litigation, Mr. Affeldt seeks to recover attorneys' fees and costs (though a motion to dismiss the complaint as to fees has been filed, it does not appear to have been signed or journalized).

Analysis of the ramifications of this peculiar situation is difficult. Once again this Court is confronted with circumstances unlike any which it has either encountered in the past or been able to uncover in reported decisions. Left without the guidance of prior experience or precedent, I conclude that there are two distinct types of problems which this situation creates. The first is the question of independence; the second is one of a potential conflict of interest.

The first question may be stated as whether the attorney-client relationship between Mr. Westmeyer and Mr. Affeldt threatens Mr. Westmeyer's independence as counsel to the class. Were there no other basis for concluding that Mr. Westmeyer does not satisfy the mandate of independence, it might be possible to conclude that no impediment results from his status as Mr. Affeldt's attorney in *Affeldt v. Frye*. As presently framed, the issues in the state court litigation look solely to the question of liability for costs which Mr. Affeldt advanced (assuming that the issue of attorneys' fees becomes removed from that case). Resolution of that question through that lawsuit does not necessarily have bearing upon the future course of the instant case.

If that were all there was, then it might be possible to conclude that Mr. Westmeyer's independence is not affected by his representation of Mr. Affeldt in that case. But that is not all there is: as discussed above, Mr. Westmeyer and Mr. Affeldt have a professional relationship, reflected in Mr. Affeldt's prospective (and potentially extensive) involvement in the other cases which he referred to Mr. Westmeyer. In my opinion, the attorney-client

relationship which also exists between former and successor class counsel in this case, though perhaps insufficient standing alone to jeopardize Mr. Westmeyer's independence, adds, in the context of the overall relationship between Mr. Westmeyer and Mr. Affeldt, additional support for a finding that the requisite degree of independence does not exist.

In any event, this Court should not disregard the potential for a conflict of interest which may arise as the state court litigation proceeds. According to my reading of the documents obtained from the state court files, the defendants (the former class representatives) in that action have yet to file a responsive pleading (*i.e.*, an answer). In which event, as I read the pertinent Ohio Rules of Civil Procedure, their time for asserting a counterclaim against Mr. Affeldt has yet to run. Ohio R. Civ. P. 12, 13.

It appears likely that Mr. Affeldt may be called upon to answer contentions by the defendants in the state court action—even absent a counterclaim by them—which challenge the adequacy of his representation of the class. In that circumstance, Mr. Westmeyer might well be called upon to defend conduct by Mr. Affeldt which this Court has, in the context of this case, found to have been indefensible vis-a-vis the class and its interests.

An even more apparent and substantial likelihood for Mr. Westmeyer to find himself in a conflict of interest between his duties to Mr. Affeldt and the class would arise in the event that the former class representatives asserted counterclaims against Mr. Affeldt in the state court action, and if those counterclaims sought damages on behalf of the class which they formerly represented (*i.e.*, malpractice

claims). That eventuality may, of course, not occur; and if it does occur, the counterclaims may well be without merit. But as long as the status of potential counterclaims remains open in the state court proceedings, the danger of such conflict of interest arising—with potentially disruptive consequences for the ability of this court to maintain control over the progress of this case to disposition—cannot be dismissed as either immaterial or insignificant.

I am not totally satisfied that these concerns can all be met by the simple expedient of Mr. Westmeyer's withdrawal from continued representation of Mr. Affeldt in the Common Pleas case. That might eliminate the duality of representation which presently confronts Mr. Westmeyer. But it does not respond to the proposition which underlies this Court's Order of March 8, 1984, that the named plaintiffs were required to secure independent counsel in order to secure class certification. The plaintiffs had the concomitant duty of making certain that such counsel was competent, in the sense that his or her representation of the class and its interests would not be impeded by the handicap of a conflict of interest.

Without question, the named plaintiffs found themselves in a situation in which they were compelled to rely upon the advice of counsel. That they may have done so is not, however, a justification for their failure to have complied with this Court's direct instruction that they secure independent counsel, and its implicit mandate that such counsel be free from any actual or potential conflict of interest. In this, as in other regards, the named plaintiffs failed to fulfill their obligations to the class under the March 8, 1984, Order.

C.

Miss Zola's Role

Corroboration for the finding that the requisite independence between Mr. Affeldt and Messrs. Robinson and Westmeyer does not exist results from the fact that successor counsel have employed Mr. Affeldt's former paralegal, Miss Lynn Zola, in a similar capacity in their office. While working for Mr. Affeldt, Miss Zola had extensive and continuous involvement in his cases. She participated in practically all phases of the litigation, including interviewing of clients, preparation of discovery materials, analysis of statistical data, and the performance of other important functions in Mr. Affeldt's lawsuits.

With reference to the instant case, the record of the hearings leading to my Report and Recommendation of October 20, 1983, reflects that Miss Zola had extensive contact with the former class representatives, which encompassed not only the types of activities described in the preceding paragraph, but, also, matters of expenditure and billing which led, ultimately, to Mr. Affeldt's disqualification as class counsel. To some extent, Mr. Affeldt's failure to respond in a timely and comprehensive manner to requests for information resulted from Miss Zola's handling of her liason role with the former class representatives. And, to some extent, she is responsible for the inadequate representation afforded to the class during Mr. Affeldt's tenure as its attorney.

These experiences have not automatically become attenuated when Miss Zola became employed with Mr. Westmeyer. In the eyes of those members of the class who had

taken the most active role in the prosecution of this litigation (namely, the former class representatives), she necessarily must remain identified with the prior unfortunate and disruptive events. In addition, she may well be called upon to testify against those individuals in the litigation brought against them by Mr. Affeldt. And, in the event that they file a counterclaim, she may be called upon to defend actions which this court has found in the Report and Recommendation of October 20, 1983, and the Order of March 8, 1984, to have been injurious to the class and its interests. That situation could place her, like Mr. Westmeyer, in conflict with the putative class.

Miss Zola, therefore, does not satisfy the criteria of independence required by the March 8, 1984, Order. To be sure, that Order only referred to independent counsel; a liberal (and, in my opinion, a fair and proper) interpretation of that Order requires equal independence from Mr. Affeldt on the part of persons, such as Miss Zola, who can be expected to play an integral and central role in the future course of this lawsuit.

This conclusion on my part should not be interpreted by either the plaintiffs or the defendant as an adverse comment upon either Miss Zola's character or her credibility. My determination that she lacks the requisite degree of independence required by the March 8, 1984, Order relates simply to her former extensive participation in this case. My concern about a possible conflict of interest relates solely to the potential for unforeseeable developments in collateral litigation, and a desire to avoid renewed challenges to the propriety of Mr. Westmeyer's status as successor counsel as a result of her continued employment in

his office. Neither that determination nor that concern are intended or should be viewed as an adverse comment on Miss Zola's character or credibility.

Conclusion

The duty imposed upon the named plaintiffs by the March 8, 1984, Order could hardly have been more clearly expressed: they were to secure counsel independent of Mr. Affeldt. For the reasons which have been stated, I find that they have failed to comply with that obligation, and that Mr. Westmeyer is not independent from Mr. Affeldt, as that term was used by the Court in its March 8, 1984, Order.

Pursuant to the terms of that Order, the named plaintiffs were also expressly and unequivocally notified that failure to obtain independent counsel as required would result automatically in denial of the motion for class certification. If the Court concludes, following *de novo* review of this Report and Recommendation, that its mandate that independent counsel be obtained has not been satisfied, then, pursuant to the March 8, 1984, Order, denial of class certification is to be automatic.

That is a drastic consequence. But, upon careful reflection and consideration, it is my recommendation to the Court that such occur, and that these cases proceed as individual actions.

My hesitation and concern with this prospect derive from the fact that the named plaintiffs are laymen, and they appear to have been controlled in large measure in their selection of successor counsel by Mr. Affeldt. Nonetheless, the duty imposed upon the named plaintiffs was

clear. And, though having had approximately six months in which to do so, they failed to meet that obligation.

This lawsuit is more than four years old. For a significant portion of that time progress has been utterly stalled as a result of the uncertainties about the status of counsel for the putative class. Despite efforts to resolve problems of Gordian complexity by straight-forward and drastic action, this Court finds itself no further along today than it was almost a year ago. There remain difficult and complex issues relating to the class certification, though the hearing on that matter was held more than fourteen months ago. There is no independent attorney who has appeared who is capable of representing the class in its quest for vindication, and there is no sure and certain prospect that such counsel would enter this case at this stage, even if the named plaintiffs were given yet another opportunity to seek out and secure such counsel.

In light of these considerations, I conclude that the Court should abide by its decision that if the named plaintiffs failed to obtain independent counsel, class certification would be denied. Though the circumstances presented by this case at this point are unique and unprecedented, the issue in the last analysis is a simple one: whether this Court should exercise its discretion under Rule 23 to deny class certification for want of adequate representation. I believe that it should do so. It is, therefore,

RECOMMENDED THAT the named plaintiffs be found to have failed to have complied with the mandate of March 8, 1984, that they secure independent counsel; and it is

FURTHER RECOMMENDED that if named plaintiff Ruth Stone has been previously designated as a class representative, that such designation be revoked; and it is

FURTHER RECOMMENDED that the motion to certify this cause as a class action be denied.

/s/ James G. Carr
United States Magistrate